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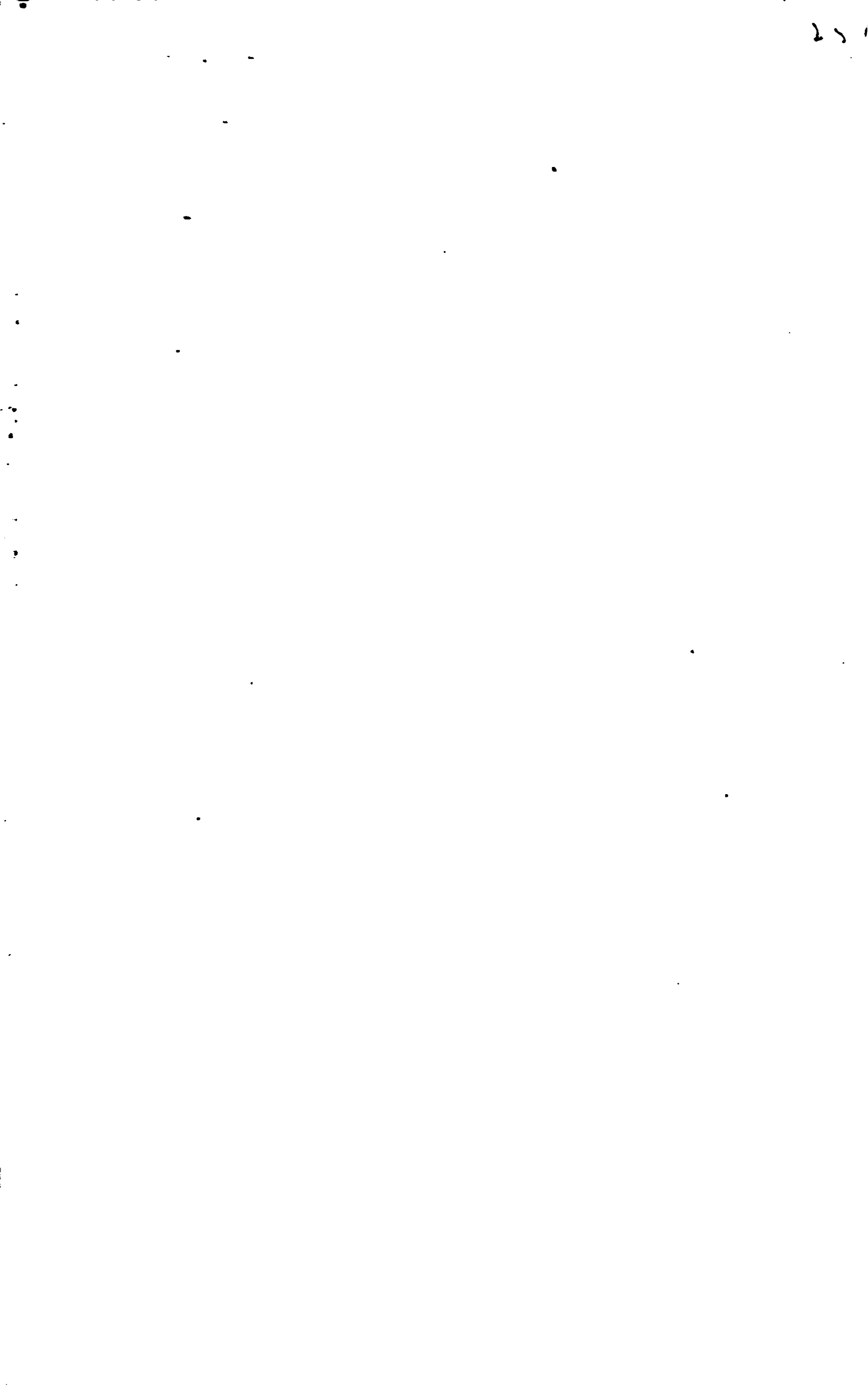
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM OCTOBER 3, 1921, TO DECEMBER 19, 1921

OFFICIAL REPORT

VOLUME 61

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1922

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JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. FRANK B. REYNOLDS, THE HON. CHARLES H. COOPER, THE HON. WILLIAM L. HOLLOWAY, THE HON. ALBERT J. GALEN,	}	Associate Justices.
--	---	----------------------------

SUPREME COURT COMMISSIONERS:

HON. WM. H. POORMAN, Chief Commissioner,
(Judge of the First Judicial District).

HON. A. C. SPENCER, Commissioner,
(Judge of the Thirteenth Judicial District).

HON. JOSEPH R. JACKSON, Commissioner,
(Judge of the Second Judicial District).

OFFICERS OF THE COURT:

WELLINGTON D. RANKIN, Attorney General.

LEROY A. FOOT, Gael G. Wilson, ALBERT H. ANGSTMAN, CHARLES P. COTTER,	}	Asst. Attorneys General.
--	---	---------------------------------

JAMES T. CARROLL, Clerk.

M. N. RACE, Marshal.

A. C. SCHNEIDER, Court Stenographer.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from March 20, 1922, to July 15, 1922.

BLENKNER, E. A., Admitted June 5, 1922.

BROWN, ROBERT KEITH, Admitted June 19, 1922.

BROWN, WILLIAM K., Admitted June 19, 1922.

BURNS, HARRY L., Admitted July 15, 1922.

CARMICHAEL, H. D., Admitted July 15, 1922.

HARPOLE, EUGENE, Admitted June 19, 1922.

JAMESON, WM. J., JR., Admitted June 19, 1922.

McFADDEN, THEO. F., Admitted July 15, 1922.

MATTSON, ALBERT A., Admitted May 8, 1922.

MERRILL, ROBERT T., Admitted June 19, 1922.

MILLER, SIDNEY FRED., Admitted July 15, 1922.

NYQUIST, DAVID N., Admitted June 5, 1922.

PLATT, EDWARD L., Admitted June 19, 1922.

SHUGHART, HENRY M., Admitted July 15, 1922.

SMITH, DAVID ROBERT, Admitted June 19, 1922.

SMITH, PAUL W., Admitted June 19, 1922.

STEWART, HAL. W., Admitted July 15, 1922.

TOOLE, BRICE, Admitted July 15, 1922.

WILKINSON, EDWARD B., Admitted July 15, 1922.

ZUNDEL, DWIGHT W., Admitted July 15, 1922.

DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA
1922.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.
District Judges: Hon. W. H. Poorman; Hon. A. J. Horsky.
Officers: County Attorney: Jos. R. Wine, Esq.
Clerk of District Court: Will Whalen.
Sheriff: Thomas H. Spratt.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.
District Judges: Hon J. J. Lynch; Hon. Wm. E. Carroll;
Hon. Joseph R. Jackson.
Officers: County Attorney: Geo. Bourquin, Esq.
Clerk of District Court: J. F. Driscoll.
Sheriff: Larry Duggan.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.
District Judge: Hon. George B. Winston.
Officers of Deer Lodge County (County Seat, Anaconda):
County Attorney: J. B. C. Knight, Esq.
Clerk of District Court: E. B. Heagy.
Sheriff: C. L. Beall.

Officers of Granite County (County Seat, Phillipsburg):

County Attorney: Wingfield L. Brown, Esq.

Clerk of District Court: Wm. B. Calhoun.

Sheriff: Fred. C. Burke.

Officers of Powell County (County Seat, Deer Lodge):

County Attorney: E. J. Cunningham, Esq.

Clerk of District Court: R. Lee Kelley.

Sheriff: J. E. Neville.

FOURTH JUDICIAL DISTRICT.**Counties of Mineral, Missoula, Ravalli and Sanders.****District Judges:** Hon. A. L. Duncan; Hon. James M. Self;
Hon. Theodore Lentz.**Officers of Mineral County (County Seat, Superior):**

County Attorney: W. L. Hyde, Esq.

Clerk of District Court: Harold B. Ives.

Sheriff: Wm. La Combe.

Officers of Missoula County (County Seat, Missoula):

County Attorney: John L. Campbell, Esq.

Clerk of District Court: Harry M. Rawn.

Sheriff: Wm. H. Houston.

Officers of Ravalli County (County Seat, Hamilton):

County Attorney: J. D. Taylor, Esq.

Clerk of District Court: J. Q. Adams.

Sheriff: Clarence E. Hogue.

County (County Seat, Thompson Falls):

County Attorney: Adelbert A. Alvord, Esq.

Clerk of District Court: L. E. Smith.

Sheriff: L. Hartman.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: Hon. Joseph C. Smith; Hon. Lyman Bennett.

Officers of Beaverhead County (County Seat, Dillon):

County Attorney: Thos. E. Gilbert, Esq.

Clerk of District Court: Wm. E. Stephenson.

Sheriff: Daniel F. Mooney.

Officers of Jefferson County (County Seat, Boulder):

County Attorney: J. E. Kelly, Esq.

Clerk of District Court: Jas. S. Flaherty.

Sheriff: T. L. Locker.

Officers of Madison County (County Seat, Virginia City):

County Attorney: Edgar P. Reid, Esq.

Clerk of District Court: Matt Carey.

Sheriff: Clarence W. Hungerford.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney: Elbert F. Allen, Esq.

Clerk of District Court: H. J. Reese.

Sheriff: James McClarty.

Officers of Stillwater County (County Seat, Columbus):

County Attorney: M. L. Parcels, Esq.

Clerk of District Court: G. B. Iverson.

Sheriff: Edward B. Fellows.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney: Horace S. Davis, Esq.

Clerk of District Court: J. E. Rees.

Sheriff: G. B. Long.

JUDICIAL DISTRICTS OF THE

SEVENTH JUDICIAL DISTRICT.

Counties of Dawson, McCone, Richland and Wibaux.

District Judge: Hon. Frank P. Leiper.

Officers of Dawson County (County Seat, Glendive):

County Attorney: F. S. P. Foss, Esq.

Clerk of District Court: Frank A. Parrett.

Sheriff: A. H. Helland.

Officers of McCone County (County Seat, Circle):

County Attorney: Homer A. Hoover, Esq.

Clerk of District Court: C. F. Campbell.

Sheriff: Floyd Davis.

Officers of Richland County (County Seat, Sidney):

County Attorney: L. V. Ketter, Esq.

Clerk of District Court: Guy L. Rood.

Sheriff: Fred. D. Sullivan.

Officers of Wibaux County (County Seat, Wibaux):

County Attorney: Elmer W. Cowee, Esq.

Clerk of District Court: C. L. Deringer.

Sheriff: A. Barclay.

EIGHTH JUDICIAL DISTRICT.

County of Cascade.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney: Howard G. Bennet, Esq.

Clerk of District Court: Alex. Remneas.

Sheriff: Bob Gordon.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: E. F. Bunker, Esq.

Clerk of District Court: W. L. Hays.

Sheriff: Chas. C. Esgar.

TENTH JUDICIAL DISTRICT.

Counties of Judith Basin and Fergus.

District Judges: Hon. Roy E. Ayers; Hon. Rudolph Von Tobel.

Officers of Fergus County (County Seat, Lewistown):

County Attorney: E. J. Baker, Esq.

Clerk of District Court: Bert Replogle.

Sheriff: Wm. B. Woods, Jr.

Officers of Judith Basin County (County Seat, Stanford):

County Attorney: John D. Mussey, Esq.

Clerk of District Court: F. Clark Grady.

Sheriff: C. H. Kelley.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. Chas. W. Pomeroy.

Officers of Flathead County (County Seat, Kalispell):

County Attorney: Dean King, Esq.

Clerk of District Court: R. N. Eaton.

Sheriff: W. R. Martin.

Officers of Lincoln County (County Seat, Libby):

County Attorney: W. H. Gray, Esq.

Clerk of District Court: Fred. F. Clark.

Sheriff: Frank R. Baney.

TWELFTH JUDICIAL DISTRICT.

County of Chouteau.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: H. F. Miller, Esq.

Clerk of District Court: Geo. D. Patterson.

Sheriff: U. W. Hammaker.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. A. C. Spencer; Hon. Robt. C. Stong.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Louis E. Haven, Esq.

Clerk of District Court: Geo. H. Miller.

Sheriff: John MacLeod.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: C. C. Rowan, Esq.

Clerk of District Court: H. P. Sandels.

Sheriff: Wm. Smith.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: E. E. Collins, Esq.

Clerk of District Court: Fred Inabnit.

Sheriff: E. M. Birely.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Broadwater, Meagher and Wheatland.

District Judge: Hon. W. L. Ford.

Officers of Broadwater County (County Seat, Townsend):

County Attorney: John A. Matthews, Esq.

Clerk of District Court: Fred Bubser.

Sheriff: Chas. B. Doggett.

Officers of Meagher County (County Seat, White Sulphur Springs) :

County Attorney: C. L. Tyman, Esq.

Clerk of District Court: F. H. Mayn.

Sheriff: Elmer Butler.

Officers of Wheatland County (County Seat, Harlowton) :

County Attorney: W. C. Husband, Esq.

Clerk of District Court: A. T. Anderson.

Sheriff: L. W. Clark.

FIFTEENTH JUDICIAL DISTRICT.

Counties of Golden Valley, Musselshell, Rosebud and Treasure.

District Judge: Hon. Geo. A. Horkan.

Officers of Golden Valley County (County Seat, Ryegate) :

County Attorney: C. W. Noyes, Esq.

Clerk of District Court: M. J. Dourte.

Sheriff: Mrs. Jesse Garfield.

Officers of Musselshell County (County Seat, Roundup) :

County Attorney: C. F. Maris, Esq.

Clerk of District Court: Henry F. Whitman.

Sheriff: Chris. H. Rusch.

Officers of Rosebud County (County Seat, Forsyth) :

County Attorney: I. S. Crawford, Esq.

Clerk of District Court: D. J. Muri.

Sheriff: Cecil E. Thompson.

Officers of Treasure County (County Seat, Hysham) :

County Attorney: E. D. Gerye, Esq.

Clerk of District Court: J. D. Clark.

Sheriff: T. J. Cunningham.

SIXTEENTH JUDICIAL DISTRICT.

Counties of Carter, Custer, Fallon, Garfield, Prairie and Powder River.

District Judges: Hon. S. D. McKinnon; Hon. S. E. Felt.

Officers of Carter County (County Seat, Ekalaka):

County Attorney: Leon L. Wheeler, Esq.

Clerk of District Court: Hallie B. Campbell.

Sheriff: Geo. S. Boggs.

Officers of Custer County (County Seat, Miles City):

County Attorney: R. B. Hayes, Esq.

Clerk of District Court: C. A. Lindeberg.

Sheriff: H. Farnum.

Officers of Fallon County (County Seat, Baker):

County Attorney: D. R. Young, Esq.

Clerk of District Court: Ralph Keener.

Sheriff: F. F. Kelling.

Officers of Garfield County (County Seat, Jordan):

County Attorney: John J. Cavan, Esq.

Clerk of District Court: J. P. MacDonald.

Sheriff: R. F. Myers.

Officers of Powder River County (County Seat, Broadus):

County Attorney: N. A. Burkey, Esq.

Clerk of District Court: H. R. Straiton.

Sheriff: W. E. Sutter.

Officers of Prairie County (County Seat, Terry):

County Attorney: Joseph C. Tope, Esq.

Clerk of District Court: S. A. Barber.

Sheriff: E. H. Brooks.

SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips and Valley.

District Judge: Hon. Carl D. Borton.

Officers of Phillips County (County Seat, Malta):

County Attorney: B. P. Sandlie, Esq.

Clerk of District Court: C. M. Porter.

Sheriff: Thos. S. Johnson.

Officers of Valley County (County Seat, Glasgow):

County Attorney: Lincoln Working, Esq.

Clerk of District Court: J. B. Christopherson.

Sheriff: Chas. Hall.

EIGHTEENTH JUDICIAL DISTRICT.

Counties of Blaine, Hill and Liberty.

District Judge: Hon. Chas A. Rose.

Officers of Blaine County (County Seat, Chinook):

County Attorney: D. L. Blackstone, Esq.

Clerk of District Court: A. W. Ziebarth.

Sheriff: Harry F. Becker.

Officers of Hill County (County Seat, Havre):

County Attorney: Max P. Kuhr, Esq.

Clerk of District Court: Geo. W. Glass.

Sheriff: Henry F. Schwartz.

Officers of Liberty County (County Seat, Chester):

County Attorney: B. R. McCabe, Esq.

Clerk of District Court: George H. Gau.

Sheriff: John H. Morgan.

NINETEENTH JUDICIAL DISTRICT.

Counties of Glacier, Pondera, Teton and Toole.

District Judge: Hon. John J. Greene.

Officers of Glacier County (County Seat, Cut Bank):

County Attorney: Wiley J. Shannon, Esq.

Clerk of District Court: Thos. B. Magee.

Sheriff: P. A. Davis.

Officers of Pondera County (County Seat, Conrad):

County Attorney: Wm. L. Bullock, Esq.

Clerk of District Court: C. H. Shepherd.

Sheriff: Frank Stocke.

Officers of Teton County (County Seat, Chouteau):

County Attorney: George W. Magee, Esq.

Clerk of District Court: B. M. Jacobson.

Sheriff: I. S. Martins.

Officers of Toole County (County Seat, Shelby):

County Attorney: J. S. McClory, Esq.

Clerk of District Court: M. P. Lyons.

Sheriff: J. S. Alsop.

TWENTIETH JUDICIAL DISTRICT.

Counties of Daniels, Roosevelt and Sheridan.

District Judge: Hon. C. E. Comer.

Officers of Daniels County (County Seat, Scobey):

County Attorney: John S. Nyquist, Esq.

Clerk of District Court: John Shippam.

Sheriff: D. J. Martin.

Officers of Roosevelt County (County Seat, Poplar):

County Attorney: Frank M. Catlin, Esq.

Clerk of District Court: Thos. R. Forbes.

Sheriff: P. J. Nacey.

Officers of Sheridan County (County Seat, Plentywood):

County Attorney: Arthur C. Erickson, Esq.

Clerk of District Court: Carl B. Peterson.

Sheriff: L. J. Collina.

SUPREME COURT RULES.

**For Rules of Supreme Court of the State of Montana, see
59 Mont. xxxv, and Amendments, 60 Mont. xvii.**

(xvii)

ERRATUM.

On page 395, in last line of paragraph 2 of syllabus, after the words "insufficient to show," insert the words "abuse of discretion," etc.

.(xviii)

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CASES DETERMINED
IN THE
SUPREME COURT
AT THE
JUNE TERM, 1921.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. FRANK B. REYNOLDS,	}	Associate Justices.
THE HON. CHARLES H. COOPER,		
THE HON. WILLIAM L. HOLLOWAY,		
THE HON. ALBERT J. GALEN,		

LARSON, APPELLANT, v. MARCY ET AL., RESPONDENTS.

(No. 4,449.)

(Submitted September 19, 1921. Decided October 3, 1921.)

[201 Pac. 685.]

Promissory Notes — Voluntary Associations — Principal and Agent—Contracts — Ratification — Presumptions — Pleading and Practice—Complaint—Courts—Appeal and Error—Nonsuit.

Pleading—Complaint—Striking of Counts—When Proper.

1. Where a cause of action is stated in two or more counts and the evidence which establishes one will also support one or more of the others, the superfluous count or counts should be stricken out.

Appeal and Error—Nonsuit—Evidence—How to be Viewed.

2. On appeal from a judgment of nonsuit, the evidence must be viewed from the standpoint most favorable to plaintiff and every fact will be deemed to be established which it tends to prove.

Promissory Notes—Payment—Implied or Constructive Trusts.

3. *Quaere*: Did conveyance of all his property by a father to his children, with the understanding that the grantees should pay a note

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outstanding against him, create an implied or constructive trust capable of being enforced by the payee?

Same—Novation—Implied or Constructive Trusts—Waiver.

4. From his acceptance of a new note from defendants for the one executed by their father (see paragraph 3 above), a novation resulted which barred plaintiff payee from thereafter enforcing the trust which he might otherwise have relied upon to secure payment of the original note.

Same—Voluntary Associations—Liability of Members.

5. Persons conducting business as a voluntary association, using a common or trade name, may be held jointly and severally liable upon a note executed in the trade name by their agent authorized to do so.

Same—Unauthorized Execution by Agent—Ratification.

6. Though one member of a voluntary association had neither express nor implied authority, while acting as its manager, to execute a promissory note, and the instrument was therefore voidable at the election of his associates, they could ratify his act, whereupon the instrument became binding upon them as of the date of its execution, so far as the payee was concerned.

Same—Principal and Agent—Ratification—Presumptions.

7. Ratification of a contract may be implied from any act or conduct on the part of the principal which reasonably tends to show an intention on his part to make the act of the agent his own, and where the agency is shown to exist, the facts will be construed liberally in favor of approval by the principal and very slight circumstances and small matters will suffice to raise the presumption of ratification.

Same—Agency—Ratification—Duty of Principal.

8. While mere acquiescence on the part of the principal in the act of the agent is not necessarily conclusive, it is to be considered an element of ratification upon the theory that it is the duty of the principal to repudiate the unauthorized act of his agent within a reasonable time after discovery, the repudiation being brought home to the party beneficially interested.

Same—Voluntary Association—Unauthorized Act of Agent—Ratification.

9. The father of defendants conveyed to them all his property, share and share alike, with the understanding that they should pay a note outstanding against him. The defendants conducted the business incident to the management of the property as a voluntary association under a trade name, one of them acting as manager; and as such he executed a new note for their father's outstanding one, signing it in the trade name. Thereafter the property was divided between them, the indebtedness evidenced by the note being recognized in the division and provision made for its payment. In an action on the note, *held*, under the above rules, that by their conduct the defendants ratified the otherwise unauthorized act of their co-defendant and gave to the note the same binding force and effect as though express authority to execute it had been conferred upon the signing defendant.

4. Acceptance of renewal note made or indorsed by personal representative of obligor in original note as novation of that paper, see note in 12 A. L. R. 1546.

5. Personal liability of member of unincorporated association on contract made by or in behalf of the association, see notes in 21 Ann. Cas. 1088; Ann. Cas. 1916A, 853; 7 A. L. R. 222.

7. What amounts to ratification of unauthorized execution of written instrument, see note in 27 Am. Dec. 343.

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Trial—Nonsuit—When not to be Granted.

10. Nonsuit should not be granted unless it appears as a matter of law that recovery cannot be had in any view which can reasonably be drawn from the facts which the evidence tends to establish.

Appeal from District Court, Rosebud County; George P. Jones, Judge.

ACTION by Hans J. Larson against Claude O. Marcy, Ollie Harding and others. Judgment for defendants. Plaintiff appeals. Reversed and remanded.

Mr. H. J. Haskell and *Mr. Henry C. Smith*, for Appellant, submitted a brief; *Mr. Smith* argued the cause orally.

Mr. Donald Campbell, for Respondents, submitted a brief and argued the cause orally.

It is alleged by plaintiff that the defendants executed the note, whereas it appears from the note itself, and from the evidence touching its execution, that the note was in fact executed solely by C. O. Marcy, he signing the name C. O. Marcy and Company, and placing the initial "C" thereunder. There is no allegation of agency, and the question of agency must be eliminated from a consideration of this cause of action. Defendants are sought to be held liable as a group of individuals upon a note which was executed by one member of the group in a fictitious name. Section 5866 of the Revised Codes of Montana of 1907 provides as follows: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided, but one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name." In the light of this statutory provision it seems idle to enter into a further discussion as to the liability of the female respondents under this second cause of action. The section above referred to has been thoroughly construed by this court, and these decisions are decisive of the question and utterly defeat the position taken by the appellant. (*Kohrs v. Smith*, 45 Mont. 467,

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124 Pac. 275; *First Nat. Bank v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582; *Young v. Bray*, 54 Mont. 415, 170 Pac. 1044.) The same question is also considered by the supreme court of the state of Washington in the case of *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845. (See, also, *First Nat. Bank & Trust Co. v. Flourney*, 24 N. M. 256, 171 Pac. 793.) The appellant Larson loaned his money, as he says, to the respondents, for a period of two years. It follows that they must have agreed that they would repay the loan with interest at the end of that time. The contract would not be enforceable unless it were in writing, and the promissory note executed and delivered formed the writing which satisfied the law. It was executed by an agent, and the authority to execute such an instrument must be in writing. It is not contended in this case that any such authority existed. An attempt was made by counsel for the appellant to show a ratification by the female respondents of the act of the respondent C. O. Marcy, but section 5425 of the Revised Codes provides that "A ratification can be made only in the manner that would have been necessary to confer original authority for the act ratified, or where an oral authorization would suffice, by accepting or restraining the benefit of the act, with notice thereof." There is no contention on the part of the appellant, and there is no evidence in the record to the effect, that the act of C. O. Marcy was ratified.

Counsel for appellant suggest in their brief that the female respondents are estopped to contest appellant's claim, and presumably to deny the agency on the part of C. O. Marcy. To be availed of, estoppel must be pleaded. (*Stafford v. Hornbuckle*, 3 Mont. 485; *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *City of Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593.)

Much stress was laid by counsel for appellant upon the fact that the female respondents did not notify Larson of their repudiation of the note in question. Their silence raises

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no estoppel against them. They knew nothing of the transaction until some time after it had occurred. They had been guilty of no misrepresentations and of no fraud. They had received no benefits from the transaction. They were entire strangers to the transaction, and no duty devolved upon them to take any action whatsoever. Their silence in no wise changed the situation of the appellant. As to the powers of an agent, and the authority of an agent in transactions of this character, where it is sought to bind an alleged principal or principals, we invite the court's attention to the cases of *Seattle Shoe Co. v. Packard*, *supra*; *Helena National Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover \$2,582 and interest thereon from April 27, 1909. Plaintiff states his cause of action in four counts. By the first it is sought to charge the defendants as trustees and to impress certain property owned by them with a lien in plaintiff's favor. The second count sets forth the cause of action as upon a promissory note executed and delivered by the defendants to the plaintiff. The third count is like the second except that it is alleged that the defendants, as copartners, executed and delivered the note in question. In the fourth count it is alleged that the defendant C. O. Marcy, acting for himself and as agent for the other defendants, borrowed the money from the plaintiff and agreed to repay the same. Issues were joined and the cause tried, with the result that the court directed a verdict against C. O. Marcy and granted a nonsuit in favor of each of the other defendants. Judgment was entered accordingly and plaintiff appealed. After the appeal was perfected defendant Harding died and her personal representative was substituted.

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Appellant insists that he made out a *prima facie* case against all of the defendants upon at least one, if not more, of the several theories of liability indicated by the different counts of his complaint. We may eliminate counts 3 and 4 at once, since the evidence does not tend to prove a partnership, and any [1] evidence which supports the fourth count will establish the second, and therefore the fourth count should have been stricken out. (31 Cyc. 121.)

The judgment in favor of the defendants who are sought [2] to be held was entered after nonsuit, and therefore the evidence is to be viewed on this appeal from the standpoint most favorable to plaintiff, and every fact will be deemed to be established which it tends to prove. (*Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325.)

In 1906 H. R. Marcy, the father of these defendants, executed and delivered to plaintiff his promissory note for \$2,100. At that time Marcy resided in Forsyth and owned a large amount of property in Rosebud county. In 1907 he conveyed his personal property to C. O. Marcy and all of his real estate to the five defendants as tenants in common, share and share alike, and removed to the state of California. For four or five years thereafter the property was managed by the defendants in the name of "C. O. Marcy and Company," with C. O. Marcy the active manager in charge. In April, 1909, plaintiff visited Forsyth to make investigation concerning the indebtedness then due to him from the elder Marcy and was informed by C. O. Marcy that he had money from his father for the plaintiff. C. O. Marcy then commenced to fill a blank check to make payment of the amount due on the note—which amount had been ascertained to be \$2,582—but before completing the task, inquired of plaintiff what he intended to do with the money, to which plaintiff replied that he did not have in mind any particular investment for it, and C. O. Marcy then solicited plaintiff to let him and his sisters have the use of the money at the same

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rate of interest (eight per cent) which the note of the elder Marcy bore. The request was acceded to and a new note for \$2,582 was then executed, signed "C. O. Marcy and Company." Within ten days or two weeks thereafter, the other defendants were apprised of the transaction, and though they complained of the act of their brother, nothing further was done by them until in 1913, when a division of the property was made between the several defendants. Upon such settlement the indebtedness to plaintiff evidenced by the note for \$2,582 was taken into consideration. It was estimated that the amount then due was \$3,000, and one-fifth thereof was charged against each distributee, some of them receiving specific property free from any charge for the indebtedness and others receiving property of a greater value and assuming responsibility for [3,4] the indebtedness. In addition to the foregoing, plaintiff sought to show that the elder Marcy conveyed his property to these defendants under an agreement that the grantees should pay his indebtedness including the indebtedness to this plaintiff, but this offered evidence was excluded. We may assume that this evidence, if received, would have established an implied or constructive trust capable of being enforced by this plaintiff in the first instance (3 Story's Equity Jurisprudence, 14th ed., sec. 1651), but since the transaction of April 27, 1909, constituted a novation (sec. 4959, Rev. Codes; *Kinsman v. Stanhope*, 50 Mont. 41, L. R. A. 1916C, 443, 144 Pac. 1083), he could not thereafter rely upon the trust or enforce the same. We have then to consider whether the evidence tends to support the allegation of the second count that the note for \$2,582 was executed and delivered by the five defendants.

To defeat liability so far as the sisters are concerned, counsel for respondents invoked the provisions of section 5866, Revised Codes, as follows: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided, but one who signs in a trade

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or assumed name will be liable to the same extent as if he had signed his own name.”

The section does not extend the protection contended for. [5] It is elementary that several persons may conduct business as a voluntary association, using a common or trade name and in that name be held jointly and severally liable upon contracts (5 C. J. 1335), and it is equally true that a person may sign a negotiable instrument by an agent. (Sec. 5867, Rev. Codes.)

Assuming that the evidence establishes the facts which it tends to establish, it may be said, then, that these five defend- [6] ants constituted such a voluntary association for the conduct of the business incident to the management of the property conveyed to them by their father. They employed the trade name “C. O. Marcy and Company” and constituted C. O. Marcy manager for the association. However, considering the nature of the business conducted, we think it cannot be said that C. O. Marcy had implied authority to execute the note for \$2,582 and bind the several members of the association thereby, and the evidence shows that he did not have express authority to do so.

He was, however, the agent of the association, and even though he exceeded his authority and the resulting contract—the note in question—was voidable at the election of his sisters, the other members thereof, such contract could be ratified by them (sec. 4994, Rev. Codes), and, if ratified, it became binding as of the date of its execution so far as this plaintiff is concerned. (31 Cyc. 1283.)

Ratification may be effected by express declaration or by [7] implication, and it may be implied from any acts or conduct on the part of the principal which reasonably tends to show an intention on his part to make the act of the agent his own. And where the agency is shown to exist, the facts will be construed liberally in favor of the approval of the principal, and very slight circumstances and small matters will

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suffice to raise the presumption of ratification in favor of a third party who has dealt with the agent upon the assumption that he possessed the authority and has surrendered a substantial right upon the faith of such assumed power. While mere acquiescence on the part of the principal is not necessarily conclusive, it is to be considered as evidence of ratification upon the theory that it is the duty of the principal to repudiate the unauthorized act of his agent within a reasonable time after discovery unless he intends to be bound by it, and such repudiation must be brought home to the party beneficially affected. The numerous authorities supporting these propositions need not be cited. They are general rules and are stated in 31 Cyc. 1245 and following pages.

Assuming the existence of the facts which the evidence tends to establish, it follows that the acquiescence of the sisters in the act of the brother in executing and delivering the note for \$2,582, coupled with their subsequent recognition of the indebtedness evidenced by it and the provision made for its discharge, constituted a ratification and gave to the note the same binding force and effect as though express authority to execute it had been conferred in the first instance. No cause should be taken from the jury unless it appears as a matter of law that recovery cannot be had in any view which can reasonably be drawn from the facts which the evidence tends to establish. (*Stewart v. Stone & Webster Eng. Corp.*, 44 Mont. 160, 119 Pac. 568.)

The court erred in granting the nonsuit, and for that reason the judgment is reversed and the cause remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur

Rehearing denied November 14, 1921.

HEFFRON, APPELLANT, v. THOMAS ET AL., RESPONDENTS.

(No. 4,867.)

(Submitted September 12, 1921. Decided October 3, 1921.)

[201 Pac. 572.]

*Attachment—Improper Issuance of Writ—Warranty—Breach.**Attachment—When Writ may Issue—Determinable from Complaint.*

1. The question whether an action is one in which a writ of attachment may issue under section 6656, Revised Codes, must be determined upon the complaint alone.

Same—Action for Breach of Warranty—Improper Issuance of Writ.

2. An action by the buyer of an automobile to recover its purchase price with interest thereon from the date of sale because of failure of title in the seller was not one upon a contract for the direct payment of money, and therefore an attachment issued therein was properly dissolved.

Appeal from District Court, Silver Bow County; Joseph R. Jackson, Judge.

ACTION by Fred Heffron against George V. Thomas and another. From an order dissolving a writ of attachment plaintiff appeals. Affirmed.

Mr. Frank L. Riley, for Appellant, submitted a brief and argued the cause orally.

The cause of action set forth in plaintiff's complaint is one upon a contract for the direct payment of money. This court, in the case of *Beartooth Stock Co. v. Grosscup*, 57 Mont. 595, 189 Pac. 773, recognized the right of the plaintiff in a case similar to the one at bar to an attachment when it said: "Under statutes somewhat similar to ours, other cases may be found wherein attachments were permitted in actions to recover the purchase price paid, where the consideration failed, or for the recovery of moneys unlawfully converted, etc. (See *Suksdorff v. Bigham*, 13 Or. 369, 374, 12 Pac. 818; *Hanley v. Combs*, 48 Or. 409, 87 Pac. 143; *Reyer v. Blaisdell*, 26 Colo. App. 387, 143 Pac. 385; *Peat Fuel Co. v. Tuck*, 53 Cal. 304.)"

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The California statute (sec. 537, Code Civ. Proc.) permits an attachment in "an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage," etc.; and the cases of *Peat Fuel Co. v. Tuck*, 53 Cal. 304, and *Hamilton v. Baker-Hansen Mfg. Co.*, 176 Cal. 569, 169 Pac. 238, are, we respectfully submit, "on all-fours" with the case at bar and uphold our contention herein. "A plaintiff who sues for breach of a contract upon which he has advanced money and received nothing in return may recover as damages the money so paid. This sum is certain and liquidated; as to it an attachment will therefore issue." (*Hamilton v. Baker-Hansen Mfg. Co.*, 176 Cal. 569, 169 Pac. 238; *Dunn v. Mackey*, 80 Cal. 104, 22 Pac. 64; *Ross v. Gold Ridge Min. Co.*, 14 Idaho, 687, 95 Pac. 821; *Beeson v. Schoss* (Cal.), 192 Pac. 292.)

Mr. Harry Meyer, for Respondent submitted a brief, and argued the cause orally.

Does the complaint state a cause of action? Counsel contend that it is an action for the recovery of the purchase price for breach of a warranty of title. While that may be the amount of damages claimed, we submit under the authorities that it must come within the statute, and that the amount of damages in an action of this kind is not certain or liquidated, but is to be left to be fixed by the jury and is the value thereof to the buyer when he is deprived of its possession, together with any costs which he has become liable to pay in an action brought for the property by the true owner. (See secs. 5103, 6060, Rev. Codes.) Plaintiff alleges a warranty of title which comes within the definition of "warranty." (Sec. 5103, Rev. Codes.) He then alleges that the defendants had no right or title to the property; that Bertha Bronsinke was the true owner and that he was deprived of his possession by Bertha Bronsinke. It is, therefore, evident that all of

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his allegations are brought within the statute (sec. 6060), that he must come within this section of the statute in order to state a cause of action, and that the amount of damages to which he is entitled under this statute is the value of the automobile on January 18, 1921, at the time the plaintiff was deprived of possession. This does not mean, as a reading of the statute discloses, that the plaintiff may fix any value upon the automobile at that time or fix his own valuation, but we take it that it means a value at that time having regard to the use of the automobile from the time of the purchase and the condition of the automobile at the time that it was taken from him. The complaint contains no allegation as to the value of the automobile on January 18, 1921, and while the plaintiff alleges the purchase price, still at the same time it is for the court or the jury after the hearing of testimony at the trial of the action to determine the value of the automobile on January 18, 1921. (*Kingsbury v. Smith*, 13 N. H. 109; *Brown v. Woods*, 3 Cold. (Tenn.) 182; *Dabovich v. Emerie*, 12 Cal. 171.) This is in direct line with the decisions of this court showing that it does not state a cause of action for the direct payment of money. (*Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197; *Carter v. Bankers Ins. Co.*, 58 Mont. 319, 192 Pac. 827.)

The phrase "direct payment of money" is defined by *Ancient Order of Hibernians v. Sparrow*, *supra*, as being immediate, express, unambiguous, confessed, absolute, and distinguishes a particular class of contracts for the payment of money from all other contracts for the payment of money, approved in *Beartooth Stock Co. v. Grosscup*, 57 Mont. 595, 189 Pac. 773. (See, also, *Tennis v. Gifford* (Iowa), 110 N. W. 586.)

MR. JUSTICE COOPER delivered the opinion of the court.

This appeal is from an order of the district court of Silver Bow county dissolving a writ of attachment. From the allega-

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tions of the complaint it appears that on the third day of December, 1920, the plaintiff purchased of defendants a seven-passenger Dodge automobile, took it into his immediate possession and paid therefor the agreed price of nine hundred dollars. On the eighteenth day of January, 1921, in an action brought by one Bertha Brosinke in claim and delivery, against the plaintiff, it was taken from his possession by the sheriff of Silver Bow county under process in his hands. It is alleged that the defendants assumed to have the lawful right to sell and to transfer the title and ownership of the automobile, when in fact they did not have title thereto; and that the plaintiff has been damaged in the sum named. The prayer is for the purchase price and interest from the date of sale. A writ of attachment was issued and levied upon the funds of the defendants, deposited with the First National Bank of Butte.

Appellant insists in argument that the suit was brought [1] to rescind the executed sale and to recover the purchase price because of a breach of warranty of title. The nature of the action is to be determined upon the complaint alone. (*Kyle v. Chester*, 42 Mont. 522, 37 L. R. A. (n. s.) 230, 113 Pac. 749.) By the same token the inquiry into its sufficiency "to sustain the attachment may not go farther than to ascertain whether the action is upon a contract, express or implied, for the direct payment of money." (*Union Bank & Trust Co. v. Himmelbauer*, 56 Mont. 82, 181 Pac. 332.) From the com- [2] plaint it is plain that the transaction involved nothing more than a sale at a stipulated sum, payment and delivery of possession. The warranty implied by law was that the title of the defendants was then good and unencumbered. (Rev. Codes, sec. 5105.) For a breach of warranty of title to personal property, section 6060 of the Revised Codes fixes the damages which may be recovered as "the value thereof to the buyer when he is deprived of its possession, together with any costs which he has become liable to pay in an action brought for the property by the true owner." To this the

plaintiff is limited. As set forth in the complaint, the transaction was not an agreement by which was acknowledged an unconditional obligation to repay to plaintiff the purchase price of the machine, with interest from date of sale—in other words, a contract, express or implied, for the direct payment of money, upon which an attachment is authorized by the provisions of section 6656 of the Revised Codes. (*Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197; *Beartooth Livestock Co. v. Grosscup*, 57 Mont. 595, 189 Pac. 773; *Carter v. Bankers' Ins. Co.*, 58 Mont. 319, 192 Pac. 827.)

The order appealed from is affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

Rehearing denied November 7, 1921.

SHAFFROTH, APPELLANT, v. THE TRIBUNE, RESPONDENT.

(No. 4,440.)

(Submitted September 16, 1921. Decided October 3, 1921.)

[201 Pac. 271.]

Libel—Newspapers—Complaint—Insufficiency.

Libel *Per Se*—Newspaper Article—Construction of Language.

1. Words used in an alleged libelous newspaper article must be susceptible of but one meaning to constitute libel *per se*, and the libelous matter may not be segregated from other parts of it and construed alone.

Same—Complaint—Insufficiency.

2. Under the above rule, *held* that the complaint in an action for libel which alleged that in the heading of an article was published the fact that F. S. (the plaintiff) had admitted a theft, and that in the body of it appeared the statement that one G. S. had done so and was awaiting sentence for grand larceny, did not state a cause of action.

2. Significance of head-lines or titles in determining whether article is libelous, see notes in 13 Ann. Cas. 375; Ann. Cas. 1914D, 96.

Identity of name as giving right of action for libel where publication was not intended to refer to plaintiff, see note in 16 Ann. Cas. 168.

[61 Mont. 14.]

'Appeal from District Court, Cascade County; H. H. Ewing, Judge.

ACTION by Fred Shaffroth against "The Tribune." Judgment for defendant. Plaintiff appeals. Affirmed.

Mr. E. A. Smith, for Appellant, submitted a brief and argued the cause orally.

In *Landon v. Watkins* 61 Minn. 137, 63 N. W. 615, the court said that in determining whether a publication is libelous *per se*, the head-line of the article should be considered. The head-line of an article or paragraph, being so conspicuous as to attract the attention of persons who look casually over a paper without carefully reading all its contents, may in itself inflict very serious injury upon a person, both because it may be the only part of the article which is read, and because it may cast a graver imputation than all the other words following it. There is no doubt that in publications concerning private persons, as well as in other publications which are claimed to be libelous, the head-lines directing attention to the publication may be considered as a part of it, and may even justify a court or jury in regarding the publication as libelous when the body of the article is not necessarily so. (*Allen v. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707, 3 L. R. A. 532, 41 N. W. 936; *Hayes v. Press Co.*, 127 Pa. St. 642, 14 Am. St. Rep. 874, 5 L. R. A. 643, 18 Atl. 331.)

In *Brown v. Independent Publishing Co.*, 48 Mont. 380, 138 Pac. 258, the court said: "In determining whether the language complained of is libelous *per se* it must be construed in its relation to the entire article in which it appears, and the entire printed statement must be viewed by the court as a stranger might look at it, without the aid of special knowledge possessed by the parties concerned." (*Denny v. Northwestern Credit Assn.*, 55 Wash. 331, 25 L. R. A. (n. s.) 1021, 104 Pac. 769.)

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Messrs. Freeman & Thelen and *Messrs. Norris & Hurd*, for Respondent, submitted a brief; *Mr. Geo. E. Hurd* argued the cause orally.

It must appear from the complaint the plaintiff was referred to in the alleged libelous publication. The court is referred to the case of *Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 20 L. R. A. 856, 34 N. E. 462. In this case A. P. H. Hanson complained of an article published of and concerning "H. P. Hanson, a real estate and insurance broker of South Boston," and the court held that the plaintiff could not recover; that it appeared that there was no intention to refer to him, and that it was necessary for plaintiff to show that his name was used, and that he was the person who was intended to be referred to.

In the case of *Harvey v. Coffin*, 5 Blackf. (Ind.) 566, the supreme court of Indiana has held that if the language used is such as to render uncertain the name of the person referred to, the action is not maintainable. In this case the court quotes with approval from the case of *Wiseman v. Wiseman*, *Cro. Jac.* 107, as follows: "For words actionable ought to purport in themselves precise slander without ambiguousness so that everyone who hears them might know of whom they are spoken."

MR. COMMISSIONER JACKSON prepared the opinion for the court.

Fred Shaffroth sued "The Tribune," a Great Falls newspaper, for libel, alleging the libelous matter to be as follows:

"HE PLEADS GUILTY TO GRAND LARCENY.

"FRED SHAFFROTH ADMITS THEFT OF PIECE OF MACHINERY
FROM GREAT NORTHERN.

"George Shaffroth is now awaiting sentence for grand larceny, to which charge he yesterday entered a plea of guilty in the district court before Judge H. H. Ewing. Shaffroth was arraigned upon an information which charged him with the theft on Nov. 10 of an Avery Tractor magneto, valued at \$90,

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the property of the Avery Company, which was taken from the possession of the Great Northern Railway. He appeared without counsel and waiving all his rights to time he entered a plea of guilty and was remanded to the custody of the sheriff to be brought up later for sentence.”

To the amended complaint the trial court sustained a general demurrer, and some time thereafter rendered judgment for the defendant, plaintiff standing on the amended complaint. From the judgment plaintiff appeals. The error predicated will be disposed of in an analysis of the complaint.

Reading the article alleged to be libelous, and viewing it [1,2] in the light most favorable to plaintiff's contention, produce but mental confusion as to the name of the accused. Taking the entire statement “as a stranger might look at it without the aid of the knowledge possessed by the parties concerned” can leave no doubt but that the accused who admitted the theft is George Shaffroth and not Fred.

It is well-settled law that the words used in the alleged libelous article must be susceptible of but one meaning to constitute libel *per se*, and that the libelous matter may not be segregated from other parts and construed alone. (*Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 3 Ann. Cas. 546, 78 Pac. 215; *Brown v. Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258.)

The latter case is determinative of the question involved here. The complaint does not state facts sufficient to constitute a cause of action.

For the reasons herein contained, we recommend that the judgment appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

Affirmed.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1921.

THE HON. THEODORE BRANTLY, Chief Justice.

<p>THE HON. FRANK B. REYNOLDS, THE HON. CHARLES H. COOPER, THE HON. WILLIAM L. HOLLOWAY, THE HON. ALBERT J. GALEN,</p>	}	<p>Associate Justices.</p>
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GRIMSTAD ET AL., APPELLANTS, v. JOHNSON ET AL., RE-
SPONDENTS.

(No. 4,434.)

(Submitted September 15, 1921. Decided October 10, 1921.)

[201 Pac. 314.]

Husband and Wife—Divorce—Reconciliation—Attorney's Fees
—Statutes.

Divorce—Dismissal of Action—Attorney's Fees — When not Recoverable from Husband.

1. An action against the husband for legal services rendered the wife in instituting divorce proceedings, which were dismissed by her soon after their commencement, did not lie under section 3677, Revised Codes, which provides that while a divorce action is pending the court or judge may require the husband to pay suit money to enable the wife to prosecute (or defend) the action, the power thus conferred being exclusive and ancillary to, and not independent of, the divorce action.

1. Liability of husband for counsel fees incurred by wife in divorce action, see notes in 15 **Ann. Cas.** 21; **Ann. Cas.** 1917A, 689, 702.

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Same—"Necessaries"—Suit Money not a "Necessary."

2. An action of the nature of the above is not maintainable under section 3724, Revised Codes, impliedly conferring authority upon the wife to charge her husband, as his agent, for the value of articles necessary for her support, a want of funds with which to prosecute a suit for a divorce not being a "necessary" as that term is employed in that section.

Same—Husband and Wife—Statutes Exclusive.

3. By the enactment of sections 3641–3689, Revised Codes, and sections 3724 and 3725, and others *in pari materia* with them, the subjects of divorce, separate maintenance, as well as the rights, duties and obligations of husband and wife were intended to be fully covered, and hence all rules theretofore in force are thereby supplanted.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

ACTION by O. K. Grimstad and Rockwood Brown, copartners under the firm name and style of Grimstad & Brown, against John A. and Clara E. Johnson. From a judgment in favor of the former, plaintiffs appeal. Affirmed.

Messrs. Grimstad & Brown, for Appellants, submitted a brief; *Mr. O. K. Grimstad* argued the cause orally.

The only question in this action is whether or not attorneys for the wife can recover from her husband for services rendered at her instance and request in a divorce proceeding which she voluntarily commenced and later had dismissed. The district court held that he was not liable. It conclusively appears that the aid and assistance of attorneys was necessary, for the protection of the wife of the defendant, and our contention is that the husband is liable. (*Fullhart v. Fullhart*, 109 Mo. App. 705, 83 S. W. 541; *Beaulieu v. Beaulieu*, 114 Minn. 511, 131 N. W. 481; *Powell v. Lilly*, 24 Ky. Law Rep. 193, 68 S. W. 123; *McMakin v. Wycliffe*, 16 Ky. Law Rep. (Abstract) 240; *Kiddle v. Kiddle*, 90 Neb. 248, Ann. Cas. 1913A, 796, 36 L. R. A. (n. s.) 1001, 133 N. W. 181; *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914; *Davis v. Davis*, 141 Ind. 367, 40 N. E. 803; *Preston v. Johnson*, 65 Iowa, 285, 21 N. W. 606; *Maddy v. Charles Pervulsky*, 178 Iowa, 1091, L. R. A. (n. s.) 335, 160 N. W. 762; *Wick v. Beck*, 171 Iowa,

115, Ann. Cas. 1917A, 691, 153 N. W. 836; *Bord v. Stubbs*, 22 Tex. Civ. 242, 54 S. W. 633; *Gosett v. Patten*, 23 Kan. 340; *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637; *Naumer v. Gray*, 28 App. Div. 529, 51 N. Y. Supp. 222.)

Messrs. Nichols & Wilson, for Respondents, submitted a brief; *Mr. Harry L. Wilson* argued the cause orally.

Our contention is that in the absence of a contract, express or implied, the husband is not liable for the payment of his wife's counsel fees in the divorce action unless such fees were by the court awarded and ordered paid in the divorce action. No contract is pleaded; it does not appear from the complaint that the payment of any attorneys' fees was ever ordered in the divorce action, and hence the complaint herein fails to state a cause of action as against the respondent, and his separate demurrer was properly sustained. (*Clark v. Burke*, 65 Wis. 359, 56 Am. Rep. 631, 27 N. W. 22; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695; *Shelton v. Pendleton*, 18 Conn. 417; *McCullough v. Robinson*, 2 Ind. 630; *Coffin v. Dunham*, 8 Blackf. (Ind.) 317, 44 Am. Dec. 769; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Yeiser v. Lowe*, 50 Neb. 310, 69 N. W. 847; *Isbell v. Weiss*, 60 Mo. App. 54; *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *McCullough v. Murphy*, 45 Ill. 256; *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735; *Zent v. Sullivan*, 47 Wash. 315, 15 Ann. Cas. 19, 13 L. R. A. (n. s.) 244, 91 Pac. 1088; *Dow v. Eyster*, 79 Ill. 254.) Not a single one of the cases cited by appellants goes to the extent of holding that in the absence of a contract, express or implied, and where there is a statute similar to our own authorizing the court to compel the husband to pay the attorney fees of the wife in a divorce action (Rev. Codes, sec. 3677), the wife's attorneys may, by independent action against the husband, recover for their services,—particularly where there has been a dismissal of the divorce action or a reconciliation of the parties thereto. And that is the precise question, and the only question, presented by this appeal.

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MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On October 1, 1918, Clara E. Johnson, through the plaintiffs, her attorneys, brought an action in the district court of Yellowstone county against John A. Johnson, her husband, for a divorce on the ground of extreme cruelty. Upon filing the complaint, she made an application for an order requiring the defendant to show why he should not pay her alimony pending the action, including suit money and counsel fees. The application disclosed that she was in ill health and without means to support herself or to pay counsel for services necessary to enable her to prosecute the action. It further disclosed that her husband was possessed of considerable property from which he was receiving a monthly income of approximately \$500. Before the hearing was had under the order, and without consulting her attorneys, she became reconciled to her husband and resumed marital relations with him. Later she directed the plaintiffs to dismiss the action, and neither she nor her husband appeared at the time set for hearing under the order. Thereafter plaintiffs brought this action against John A. Johnson, the husband, joining the wife as codefendant, to recover \$300, the amount of the fees which the latter had requested the court to allow in her application, alleging that the divorce action had been brought in good faith and that this sum was reasonable compensation for their services rendered therein. To this complaint the defendant John A. Johnson interposed his separate general demurrer. After consideration the court sustained it, and, the plaintiffs standing on their complaint, rendered judgment in favor of this defendant for his costs. Plaintiffs have appealed.

The single question presented for decision is whether, under any recognized rule or principle of law, the plaintiffs are entitled to maintain this action.

It is not entirely clear from the argument found in the [1] brief submitted by plaintiffs, whether their theory is

that the husband is made liable under section 3677 of the Revised Codes, or is liable on the ground that the wife had implied authority under section 3724 to employ counsel upon his credit as a necessary. Section 3677, so far as it is pertinent here, reads as follows: "While an action for divorce is pending the court or judge may, in its or his discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. * * * The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered or revoked at the discretion of the court."

We shall not stop to inquire what power the courts in this jurisdiction would have had at common law in divorce cases to require the husband to pay the fees of counsel employed by the wife. The statute declares the extent of the power and, in our opinion, is exclusive; for "in this state there is no common law in any case where the law is declared by the Code or the statute" (sec. 8060, Rev. Codes), and "the Code establishes the law of this state respecting the subjects to which it relates." (Sec. 8061.) It requires but a casual reading of section 3677, *supra*, to ascertain that the object of the legislature in enacting it was to give the courts discretionary power, to be exercised during the pendency of the action upon a proper showing by the wife in an application for that purpose, to compel the husband to provide the means necessary to enable her to prosecute or defend the action. In other words, the power in this behalf conferred by the statute is only ancillary to, or an incident of, an action for divorce. This renders the conclusion necessary that when the main power conferred by this section has ceased to be operative, the ancillary or incidental power also ceases to be operative and cannot be invoked by the wife's counsel in an independent action to charge the husband.

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Upon examination of the decided cases in other states which have the same or similar statutory provisions, we find that their courts generally agree that counsel fees may be allowed only while the divorce action is pending. (*Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87; *Burnham v. Tizerd*, 31 Neb. 781, 48 N. W. 823; *Clarke v. Burke*, 65 Wis. 359, 56 Am. St. Rep. 631, 27 N. W. 22; *Isbel v. Weiss*, 60 Mo. App. 54; *Meaher v. Mitchell*, 112 Me. 416, Ann. Cas. 1917A, 688, 92 Atl. 492; *Humphries v. Cooper*, 55 Wash. 376, 133 Am. St. Rep. 1036, 104 Pac. 606; *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735; *Kincheloe v. Merriman*, 54 Ark. 557, 26 Am. St. Rep. 60, 16 S. W. 578; *Zent v. Sullivan*, 47 Wash. 315, 15 Ann. Cas. 19, 13 L. R. A. (n. s.) 244, 91 Pac. 1088.) In some of the states this is held to be the rule independently of the statute, the theory being that the power to allow counsel fees is a mere incident to the general power possessed by the courts to grant divorces. (*Kuntz v. Kuntz*, 80 N. J. Eq. 429, 83 Atl. 787.) The rule was impliedly recognized by this court in the case of *Bordeaux v. Bordeaux*, 29 Mont. 478, 75 Pac. 359; s. c., on rehearing, 32 Mont. 159, 80 Pac. 6. In that case it was held that a district court has no power under the statute to allow counsel fees for past services, even during the pendency of the divorce proceedings, the only possible exception to this being, perhaps, where the allowance for such past services would be necessary to enable the wife to continue the future prosecution of the action or to make her defense. If the court cannot allow counsel fees for past services, it necessarily follows that it cannot, after the divorce proceeding has terminated, entertain an independent action by counsel against the husband for services rendered for the wife during the pendency of the action.

Nor do we think the action is maintainable on the ground [2] that the services of the plaintiffs were necessary in the sense in which this term is used in section 3724, *supra*. This section impliedly confers authority upon the wife to charge her

husband as his agent for the value of articles necessary for her support when he neglects to make adequate provision for her, in all cases except as provided by section 3725. Under this section he is not liable for her support if she abandons him until she offers to return to him, unless she was justified by his conduct, in the first instance, in abandoning him. Nor is he liable if she is living separate from him by agreement, unless her support is stipulated for in the agreement. When she is not at fault, she has her option to rely upon the authority given her by section 3724, or, if any ground for divorce exists, she may bring her action for a divorce or for separate maintenance, under section 3643. It is never necessary, however, for the wife to have a divorce, no matter upon what ground she seeks it. The necessities referred to in section 3724 are such as should be provided by the husband for the wife to sustain her as his wife, and not to provide for her future condition as a single woman, or, perhaps, as the wife of another man. The duty to support the wife grows out of the marital relation, and when the wife seeks to dissolve this relation and set it aside, her want of funds to carry on the litigation is in no sense of the term a "necessary" for her support as a wife.

The legislature in enacting the provisions of the Code—[3] sections 3641 to 3689—evidently intended to cover the whole subject of divorce and separate maintenance, and by sections 3724 and 3725, and others *in pari materia* with them, to cover the whole subject of the rights, duties and obligations of the husband and wife, and thus to supplant all rules theretofore in force on the subject. From no point of view do any of them give support to the present action.

We think the judgment of the district court was right, and must be affirmed. It is so ordered.

Affirmed.

ASSOCIATE JUSTICES REYNOLDS, COOPER, HOLLOWAY and GALEN concur.

STATE, RESPONDENT, v. RIGGS, APPELLANT.

(No. 4,839.)

(Submitted September 13, 1921. Decided October 10, 1921.)

[201 Pac. 272.]

*Criminal Law—Homicide—Corpus Delicti—Circumstantial Evidence—Insufficiency.**Homicide—Circumstantial Evidence—Insufficiency.*

1. In a prosecution for murder alleged to have been committed by defendant, the husband of deceased, by striking her a blow on the head and thereafter setting her clothing afire, evidence, circumstantial in character, examined and *held* insufficient to sustain conviction. (MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE REYNOLDS dissenting.)

Same—Evidence—Conjectures—Suspicious—Evidence—Insufficiency.

2. A defendant may not be convicted on conjecture, however shrewd, on suspicion, however justified, on probability, however strong, but only upon evidence which establishes his guilt beyond a reasonable doubt, i. e., upon proof such as to logically compel the conviction that the charge is true.

Same—Corpus Delicti—Evidence—Establishes What.

3. In prosecutions for murder, proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but it comprehends neither the identity of the person alleged to have been killed nor the killing by the person accused.

Same—Death—Criminal Agency—Proof.

4. In homicide, the fact of the death being established, it must affirmatively be made to appear that it resulted from a criminal agency, that it was not due to natural causes or suicide, but was due to the act of the defendant.

Same—Death—Accident—Natural Causes—Evidence—Insufficiency.

5. Where the evidence, on the one hand, shows that death may have been the result of natural causes or suicide, or, on the other, may have been due to criminal agency, a conviction cannot be sustained, since proof of death cannot rest in the disjunctive.

Same—Death—Circumstantial Evidence—Failure of Proof.

6. Where the circumstances relied on by the state to prove that death was caused by the criminal act of another are consistent with the theory that it was produced by natural causes, there is a failure of proof.

Same—Death Due to Criminal or Innocent Cause—Evidence—Rule.

7. Where an act may be attributed to a criminal act or an innocent cause, it will be attributed to the innocent rather than the criminal one.

Same—Circumstantial Evidence—Definition.

8. Circumstantial evidence is the proof of certain facts and circumstances from which the jury may infer other connected facts which

2. For authorities on the law of circumstantial evidence, see notes in 62 Am. Dec. 179; 97 Am. St. Rep. 771.

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usually and reasonably follow according to the common experience of mankind, and may be either certain, i. e., that from which the conclusion naturally follows, or uncertain, i. e., that from which the conclusion does not necessarily, but may, follow, and is obtained by process of reasoning only.

Same—Circumstantial Evidence—Sufficiency—Rule.

9. Where a conviction is sought solely on circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any rational hypothesis other than his guilt.

Same—Circumstantial Evidence—*Quantum* of Proof Necessary.

10. The same degree of certainty is required to warrant a conviction on circumstantial evidence as when the evidence is direct, and in either case the jury must be satisfied beyond a reasonable doubt before they can find defendant guilty.

Same—Circumstantial Evidence—When Conviction not Sustained.

11. Where the evidence in a criminal cause is unsubstantial or wholly lacking in material particulars, or where it is meager, fragmentary, disconnected or speculative, conviction cannot be sustained.

Appeals from District Court, Yellowstone County; Charles A. Taylor, Judge.

GEORGE T. RIGGS was convicted of murder in the first degree, and appeals from the judgment and from an order denying him a new trial. Reversed and remanded, with directions to dismiss the case and discharge the defendant.

Mr. H. C. Crippen and *Messrs. Nichols & Wilson*, for Appellant, submitted a brief; *Mr. Crippen* and *Mr. Harry Wilson* argued the case orally.

The court erred in permitting evidence to be admitted concerning remote quarrels between the defendant and the deceased. The rule no doubt is that where there has been mistreatment of the deceased by the defendant continuously for a long period of time, the same can be shown by the state as a part of its case in chief, but that is not the situation here. There were only two quarrels, one about three or four years before March 22, 1918, and the other six or seven years before, and nothing in between to indicate hostility or unfriendliness.

9. Exclusion of every reasonable hypothesis except guilt of defendant as necessary to conviction on circumstantial evidence, see note in *Ann. Cas.* 1913E, 428.

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Under such circumstances, we submit it was error and very prejudicial to the defendant to allow such testimony to be given. (13 R. C. L., p. 912, sec. 216; *State v. Bass*, 251 Mo. 107, 157 S. W. 782, at 787; *Billings v. State*, 52 Ark. 303, 12 S. W. 574; *Commonwealth v. Abbott*, 130 Mass. 472.)

The evidence is insufficient to sustain the verdict, and is contrary to the law. The *corpus delicti* has not been proved in this case. The court, in Instruction No. 29, told the jury that they "should be convinced by the evidence, beyond a reasonable doubt, of the criminal agency employed in the commission of the crime charged; that is, of the manner in which the death of the deceased was accomplished." The evidence in this case falls far short of that result. The evidence is wholly insufficient not only to fix the crime upon the defendant, but to show, beyond a reasonable doubt, that there was a criminal agency. "Insufficient evidence is, in the eye of the law, no evidence." (*In re Case*, 214 N. Y. 199, 108 N. E. 408; *Jewell v. Parr*, 13 Com. B. 916, 138 English Reprint, 1460.) The state's theory is that the deceased was unconscious at the time she was burned; that that unconsciousness was brought about by a blow on the head administered by the defendant.

Starkey, in his work on Evidence, paragraph 863, announces the doctrine that even when the body has been found, and although indications of a violent death be manifest, it shall be fully and satisfactorily proved that the death was neither occasioned by natural causes, by accident, nor by the act of the deceased himself. (See, also, 13 R. C. L. 737.) "The *corpus delicti* is the body or substance of the offense. This means, and has always meant, the existence of the criminal fact." (*State v. Calder*, 23 Mont. 505, 59 Pac. 904, at 906.) The death must be shown and the criminal agency. These are questions for the court. (*State v. Pepo*, 23 Mont. 473, 59 Pac. 721; *State v. Nordall*, 38 Mont. 327, 99 Pac. 960, commenting on *Pepo Case* and *Calder Case*.) And such criminal agency must be proved beyond a reasonable doubt, and cannot rest on

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speculation. (Rev. Codes, sec. 8298; *State v. Merrill*, 72 W. Va. 500, 78 S. E. 699; *Dreessen v. State*, 38 Neb. 375, 56 N. W. 1024; *Taylor v. State*, 108 Miss. 18, 66 South. 321; *People v. Parmlee*, 112 Mich. 291, 70 N. W. 577; *State v. Tittaton*, 159 Mo. 4, 60 S. W. 743; *Martin v. State*, 79 Tex. Crim. 393, 186 S. W. 331; *State v. Concelin*, 250 Mo. 624, 157 S. W. 776; *Ausmus v. People*, 47 Colo. 167, 19 Ann. Cas. 491, 107 Pac. 204; *People v. Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529.)

The theory of the defense is that the deceased caught fire accidentally. "Where an act may be attributed to a criminal or an innocent cause, it will be attributed to the innocent cause rather than to the criminal one." (*People v. Ahrling*, 279 Ill. 70, 116 N. E. 764; *State v. Nesenhener*, 164 Mo. 461, 65 S. W. 230; *Abbott v. Commonwealth* (Ky.), 42 S. W. 344; *Lovelady v. State*, 14 Tex. App. 545; also 17 Tex. App. 286.)

The evidence on the second trial, with regard to the quarrels and with regard to the insurance, is, if anything, less than it was on the first trial. There was no motive for the commission of the crime alleged. "Although motive finds no place in the legal theory of murder, yet in practice it frequently is of great importance. Cases may arise which turn wholly upon the question of whether the evidence discloses a motive for the commission of crime." (Ann. Cas. 1912C, p. 238; *State v. Bass*, 251 Mo. 107, 157 S. W. 782, at 787 and 788; *State v. Lucey*, 24 Mont. 295, 61 Pac. 994.)

The entire evidence creates only a suspicion or probability of guilt. This is not a sufficient basis for a conviction of crime. (*People v. Ahrling*, 279 Ill. 70, 116 N. E. 764; *People v. Campagna*, 240 Ill. 378, 88 N. E. 797; *People v. Rischo*, 262 Ill. 596, 105 N. E. 8.)

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Foot* argued the cause orally.

MR. JUSTICE GALEN delivered the opinion of the court.

On the night of March 22, 1918, Matie Riggs, wife of the defendant, was found dead on the kitchen floor of her home. Resulting therefrom, the defendant was charged, by information filed in Yellowstone county, with the crime of murder in the first degree. This is the second time this case has been considered by this court on appeal. On the first appeal, which was taken from a judgment imposing the death penalty, and from an order denying motion for a new trial, the cause was by controlling opinion remanded for new trial, because of insufficiency of the evidence. (*State v. Riggs*, 56 Mont. 393, 185 Pac. 165.) From a perusal of the facts recited in the former decision, it would appear that the evidence adduced on the second trial was not materially different from the first. The second trial resulted in a verdict of guilty of murder in the first degree, wherein defendant's punishment was fixed at life imprisonment. The case is now before us as a result of the second trial and the verdict and judgment rendered and entered therein, the appeal being from the judgment and order denying defendant's motion for a new trial.

Ten errors are specified as reason for reversal, but in our view only one is necessary for consideration in order to make complete and satisfactory disposition of the appeal, namely: Is the evidence sufficient to sustain the verdict and judgment?

It appears that the defendant and his wife intermarried at [1] Billings, Montana, in 1901, the wife at that time having an infant child, a girl, named Opal. Nine children were born of the marriage, seven of whom were living at the time of the wife's death. At that time Opal, defendant's stepdaughter, was eighteen years of age, and of the living children of the marriage, Grace was fifteen, Chester thirteen, Bertha twelve, Ida five, Calvin three, Eddie and Roy being younger than Chester, and older than Calvin. At the time of her death, the wife was thirty-nine years of age, and apparently in good physical condition, and the defendant was forty-seven. The

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defendant, his wife and children, including Opal, were living, and for seven years had lived, on a forty-acre unit of the "Huntley Reclamation Project," about six miles from the town of Huntley, in Yellowstone county. Their place of abode consisted of a two-story frame house of three rooms. There they lived until the eventful night in March, 1918, and by thrift and industry had accumulated considerable property, the wife at all times doing her full part about the home and farm. On the ground floor there were two rooms, one of which was used as a kitchen and dining-room combined, and the other as a living-room, wherein the wife of the defendant had her bed and slept. The second story comprised one large bedroom, nineteen feet four and one-half inches east to west, by seventeen feet four and one-half inches north to south, located immediately over the living-room, in which second story room the defendant and the children slept in four separate beds. The second story was reached by a stairway three feet one inch in width, running up the west inside wall of the living-room, entrance to which stairway was through a doorway located in the southwest corner of the living-room. This door was used to shut off the stairway and the sleeping quarters upstairs from the ground floor rooms. At the foot of the stairway and immediately opposite the entrance thereto was a window in the west side wall of the house, twenty-four inches wide and fifty-four inches high. There was no closure of the stairway on the second floor. The two-story portion of the house was covered by a gable roof, the kitchen being in a lean-to on the south. The kitchen was connected with the living-room by a panel door. There were two windows in the bedroom upstairs, one on the east end and the other on the west, both being of the same dimensions, twenty-four inches by fifty-four inches, the west window being located directly over the stairway. Such east window was almost directly over a similar window in the living-room. Hog wire was attached to the east side of the house up to the second story window and had been there in place for a long while, used for the

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training of vines. The dimensions of the kitchen were east to west nineteen feet three inches and north to south eleven feet nine inches. In the southwest corner of the kitchen the pantry was located, a room four feet nine inches long by six feet seven inches in width. The range for cooking purposes was in the kitchen at the northeast corner of the pantry, and the nearest point of such range from the door leading into the living-room was seven feet three inches. To the southeast corner of the kitchen there was a dining-table and a bench, used to sit at the table when eating. Immediately to the rear of the range, to the west and north of the pantry, was a cupboard in the kitchen, and by it to the north, on the west side of the kitchen, there was a wash-bench. On the wash-bench was a one-gallon coal-oil can, partially filled, used to kindle fires and fill the lamps. It was in the place where generally kept. There was an oil lamp on the kitchen-table. The east second-story bedroom window was twelve feet two inches from the ground. Several matches were found strewn over the top of the range. The defendant usually slept alone in a bed in the second-story bedroom, located in the southeast corner of the room, farthest removed from the top of the stairway. Not infrequently he would take the youngest child, Calvin, to bed with him, although most of the time Calvin would sleep downstairs with his mother. The night in question the defendant slept in the bed usually occupied by him and took Calvin to bed with him. Opal slept in a bed with Eddie on the south side of the room, just west of the bed occupied by the defendant; Gracie, Bertha and Ida occupied a bed on the north side of the room, near the top of the stairway, in the northwest corner thereof, and Chester and Roy slept in a bed in the northeast corner of the room. The bed in which the wife slept was a standard size double bed in the southeast corner of the living-room, directly across that room from the stairway entrance, a distance of eleven feet two inches, and the head of the bed nearest the door leading into

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the kitchen was twenty inches. From the knob side of the stairway door to the center of the door leading to the kitchen was a distance of six feet nine inches. There was a well containing water with pump attached on the west side of the house, sixteen feet therefrom, and at a distance of thirty-one feet south of the kitchen, the root-house, facing west, was located.

The wife was insured for \$1,000, and the house and contents were insured for like amount. The defendant had been negotiating with a neighbor, Looney Stockton, to buy the latter's farm adjoining that owned by the defendant, for the sum of \$4,000. On the day before Mrs. Riggs' death, the defendant told Stockton he would buy the latter's farm, provided he (the defendant) could get the money, and on that day the defendant told Stockton he would endeavor to secure a loan on both places, and on the same day the defendant had spoken to S. E. Dove, a banker at Huntley, about getting the money. He also proposed trying to obtain a federal loan, and requested Mr. Stockton to go down to Osborn, to see Mr. Bowman about securing the amount required on the security of both farms.

The defendant and his wife had quarreled from time to time, principally over the disciplining of Opal, the oldest child, the defendant's stepdaughter.

At the time of her death, the deceased was clothed in a suit of fleece-lined cotton underwear, and over that an outing flannel nightgown, fleeced on both sides, and both garments were highly inflammable. She was found lying dead and badly burned about the body, on the bare floor of the kitchen between the cooking-stove and the dining-table. There was evidence of three quarrels between the defendant and his wife, widely separated in point of time, but only Mrs. Smith and Opal, both witnesses being hostile to the defendant, remember about any quarrel of any seriousness, and there is no evidence of any threat of any character ever being made by the defend-

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ant against his wife. Neither Grace nor Chester know anything of any serious quarrels between their mother and father, and they did not seem to attach any importance to any disagreement between them. All agree that on the evening of the tragedy they were friendly and everything about the house was peaceful. There had been no quarrel between the defendant and his wife for more than a month prior to that time. After supper the evening chores were done outside of the house by the defendant, Opal and Chester. Upon the completion thereof, they all returned into the house. At that time, which was about 8 o'clock in the evening, the mother and the little child, Calvin, had retired, Calvin being in the bed in the living-room with his mother. It was the custom of the mother to retire quite early. The smaller children, as usual, undressed in the kitchen and their clothing was left there, either on the floor or on a chair, and some thereof was partially burned that night. The defendant sat by the kitchen table reading a paper, and some of the children were working at their school lessons, Grace, Chester, Bertha, Eddie and Roy being at that time attending school. Chester was working on the dining-room table at arithmetic, and was the last to go to bed that night. He retired about one-half hour later than his father—after 9 o'clock. The defendant retired about 8:30 Opal says she was asleep when her father and Chester came to bed. As was his custom, the defendant that night took his shoes off in the kitchen, and left them there before going upstairs to bed, and Chester also took off his shoes before retiring and left them in the kitchen. Chester, for the state, testified:

“Papa woke me during the night. He hollered at me and told me he believed there was smoke in the house. I don't know whether I made any reply. I was sleepy and I might have said something. I might have said I didn't believe I smelled smoke, or something like that. My father didn't immediately get up, but he didn't stay in bed very long after

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that. He then said he believed there was smoke in the house and got up and went downstairs. He went down the same stairs I came up. I don't know how far down he went. I don't think he called for anyone as he went down. He didn't say anything to anybody as he was going or while he was down there at that time. He came back up and told us the house was on fire, and that we would have to get out the east window, that there was so much smoke down there we couldn't get out that way. He then opened up the window. It opens to the inside and is on hinges. He also took off the screen that was on it. During this time I got up and dressed. I didn't see Calvin around there any place upstairs after my father had told me that the house was on fire. After my father got the window open, I got down on some hogwire that was tacked up to the side of the house, to the bottom of the bedroom window. I went out of the window first and Gracie came out next. I don't remember who came out of the east window next. After I got down out of the window, I went down around back of the cellar to get the ladder. I got it and brought it around and threw it down on the side of the house, because papa told me I didn't need it. I don't know what papa was doing at that time. He was upstairs when he told me to throw the ladder down, that he didn't need it. I don't think any bedding had been thrown out; that was thrown out right after I brought the ladder out. Papa threw the bedding out. He would throw out some of the bedding and then he handed out some of the children. Gracie took them about halfway and then handed them to me until they were all taken out from upstairs. The last of the children who came out from upstairs was Opal. Papa came out next. He told me to take the bedding down to the cellar, and that was done, It was taken to the cellar for the little kids to stay on till morning. It was throwed in there and made a bed out of. After my father got out of the upstairs window he went down cellar. He just came down and asked how the little kids were

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and then went back up. I don't know who was in the cellar when my father came down. Most of the children were down there. While my father was throwing out the bedding, besides getting the ladder, I went around and looked in the south window of the kitchen. When I looked in at that window, I saw the fire. It wasn't a very large fire; it wasn't very high; it wasn't up to the window. It wasn't very far from the window where I was looking in—about the width of the door into the pantry. I looked into the window just before I went around to get the ladder. All of the articles which had been thrown down from upstairs were carried around to the cellar at the time my father got down. Besides bedclothing, he threwed down the top till of his trunk. I don't know who carried that around, but it had been carried around when my father got down. I am sure of that. I don't know who carried Calvin around that evening. After my father had gone down in the cellar to oversee the bedding down of the children, he came back and told me to go and get Mr. Moyer to come over. I then went over to Mr. Moyer's place, which is about a quarter of a mile east from our place. It was between five and ten minutes after I had gotten down from upstairs that my father told me to go over to Mr. Moyer's. It was approximately between ten and twenty minutes that it took me to go over to Mr. Moyer's, get him and return. When we came back, Gracie and Opal were out by the house. Just before we got through the fence I saw my father in the road, going south. When Mr. Moyer got to the house, he said we might just as well try and put out the fire, and Gracie and Opal handed him some water and he got inside the house and took it in and put it on the fire. He used four buckets of water in putting out the fire. They wasn't clear full. He went in the window marked 'West living-room window' on 'State's Exhibit C'; also marked 'Stairway window' on 'State's Exhibit D.' I helped in putting out the fire. I went out to the granary and got another bucket and pumped it full of water. After Mr. Moyer had put out the fire, he came outside. He

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came out through the window that he went in at. After Mr. Moyer came out, we didn't do anything until papa came. It wasn't very long before papa came back. After he came back, we waited around a little bit, and then pretty soon he sent me up to Stockton's. I don't think any of us entered the house before I went to Stockton's. My father sent me to Mr. Stockton's because he wanted him to go into Huntley and call up the coroner. I got Mr. Stockton. We didn't return together; I came back first. When Mr. Stockton and I came back, papa and Mr. Moyer and the rest of the children were at our place. I don't know what was done, if anything, after I came back. I don't know whether any of them went into the house then. I don't know whether Mr. Moyer went into the house. I went into the house that night, after the fire, when Mr. Stockton was down there. I think Mr. Moyer went in first after Mr. Stockton came, and unlocked the two doors—east and west kitchen doors. That is the room in which my mother was lying. I went into the room then; also papa and Opal. I think my papa was saying: 'My God, My God,' or something like that. I saw my mother there that night after the fire, lying on the floor, between the stove and table. She was dead at the time I saw her lying there. She was burned. That is the same place where I saw the fire burning at the time I looked in at the kitchen window. After I saw my mother lying there, dead, Mr. Moyer handed me my shoes and I went outdoors and put them on. I spent the night down in the cellar. The next morning I went up to Mr. Stockton's and stayed until noon that day. I wasn't at home at the time the coroner came down. I had my breakfast and dinner that day at Mr. Stockton's. I didn't see my mother any more after the night that I saw her there on the kitchen floor. Mr. Stockton or Mr. Moyer didn't come down into the cellar after I went down, after the fire was out. My father came down there. He didn't sleep that night. He was just around down in the cellar, and once in a while he would

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ask how the little kids was. At the time that I started over to Mr. Moyer's, my father hadn't gone to any of the windows of the house, so far as I know, and had not attempted in any way to rescue her. I knew at that time that my mother was not out. The next morning after the fire I went up to Mr. Stockton's and stayed until after dinner."

And on cross-examination he testified: "The baby Calvin didn't always sleep downstairs with my mother. When he didn't sleep there, he slept up with papa. This night of the 22d of March wasn't the first time that my father had taken Calvin up to bed with him. He did that frequently. There wasn't anything unusual in the fact that my father took his shoes off and left them downstairs that night. That is where he always pulled them off."

At the time when Chester was returning to the house with Mr. Moyer, when he saw his father going down the road, it appears that the defendant was on his way to Stockton's farm, about one-half mile distant; that the defendant was in his stocking feet and actually went to Mr. Stockton's, knocked on the door and hollered, "My house is on fire," and left immediately without giving his name.

Opal's testimony respecting defendant's first waking up and suggesting there was a fire and then going down the stairs to the door leading into the living-room and returning back to the bedroom upstairs, and getting the children all out of the house through the east second-story window, is substantially the same as Chester's. Further she testified:

"After he had gotten down on the ground, he loafed around there a while. He didn't do anything until he sent Chester over to Mr. Moyer's and then he busted in the window. Just before he sent Chester over to Moyer's he went to the cellar, to see if the children were all right and helped make a bed down for them. Chester was around there some place. I would judge it was about twenty minutes after my father got down from upstairs before he started Chester over to Moyer's, and during that time, he had just been standing around and

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seeing about the children. After he had started Chester over to Moyer's, he broke in the window with the ax that was out by the coal pile. He didn't do that right afterward. He never went to any of the windows to see anything about the fire or my mother, and he never called for her while he was standing around there during that twenty minutes. He and I did not have any conversations there on the outside while we were standing around, before Mr. Moyer came back, about trying to get my mother out. I didn't say anything to him at all about getting my mother out. I presume it was about ten minutes after Chester had gone to Moyer's that my father went and got the ax and broke out the window. He went to the coal pile to get the ax. I suppose he went first right straight to the window with the ax, I couldn't say. I don't recall where I was at the time. It was the west window, the stairway window, that he broke out. That window leads into the stairway. That is the stairway up which I had gone to go to bed that night, and the stairway down which my father had come to look at the fire. That is the only stairway in the house. He got inside there and called mother. He called her 'Matie.' That is the first time that he had called her that night. He broke the door too—the inner door, inside the stairway. That is the door marked 'Stairway door,' on 'State's Exhibit D.' He hit that with the ax and then he came back out. He broke the door up close to the knob. He didn't break it clear down. He said the smoke was so dense he couldn't go on any farther, and he just came outside and loafed around till Mr. Moyer came. It was just a few minutes after he broke this window out before Mr. Moyer came. He started out, just before Mr. Moyer came, for Stockton's. He did not make any other effort than just breaking in this west window and that door to get my mother out. After my father came out of that window, or about the time he came out, he said if my mother was in there, she was dead already. I believe that was when he made that remark. He didn't say

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whether or not he would be able to get her out. I was present when Mr. Moyer and Chester came back. Mr. Moyer took and grabbed a bucket of water and went inside and poured it on the fire. Grace and Chester were there at that time. Mr. Moyer went into the house by the stairway window, the one that is broke there. That is the same window that my father had just knocked out. That leads into the stairway. He opened up the door and went through into mother's bedroom to where the fire was. He went right through what is marked 'Living-room,' on 'State's Exhibit C,' and on down into the kitchen. Grace and I drew water for Mr. Moyer. Mr. Moyer used three buckets of water in putting out the fire. About three trips were made by Gracie and myself. Mr. Moyer didn't go out of the house during the time while he was putting out the fire, from the time he went in with the first bucket. He came to the stair door—the stair door that had been struck by my father. After Mr. Moyer had put out the fire, he came and opened up one of the doors and lit a light inside. At that time, my father was on the outside. He hadn't returned yet from Mr. Stockton's. It was just a few minutes afterwards. Mr. Moyer opened up one of the kitchen doors after he was inside of the kitchen. He opened it from the inside. That was the west door, and it is near the window that was broken out by my father. My father returned just a few minutes afterward, and Mr. Stockton was with him. Soon after that, Mr. Vandersea and Mr. Wymer came. After my father had returned, I went into the house; also Chester, Mr. Riggs and Mr. Stockton. I didn't notice what my father did at that time. He made the remark: 'My God! My God!' several times. I never noticed whether he came up to examine or look at my mother. My mother was lying between the table and stove on the floor, and she was burned from her head down to her knees, nothing but just a cinder, and from her knees on down to her feet was burned in big blisters. I didn't do anything after I went in. I wasn't in there very long,—about five minutes. Nothing took place

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then, only everybody was taken out of the house and the doctor was sent for. Mr. Stockton went after the doctor. After that, I went down to the cellar, where the other children was. My father went down in the cellar then after that time. It was about ten or fifteen minutes after that that he came down. I didn't have any conversation with him down there at that time about my mother and her death. He said something about the insurance,—that he had some insurance, about a thousand dollars, and that would help out some; that it was too bad about her death. I had known prior to that time that she was insured. I don't know when Mr. Stockton came back with the doctor. I wasn't up there at that time. I didn't go back there to the kitchen that night."

And on cross-examination she testified: "I didn't do much of anything. I just talked to the children and looked in at the fire. I saw it was blazing up, but I didn't do anything. I never suggested to my father that he do anything, and I didn't say anything to the children about it. I wasn't excited. Nobody was much excited. Everybody was cool and calm—not as much excited as they should have been in case of fire. I should have been more excited, as my mother was involved in the fire, but the fact remains I wasn't excited, and none of the rest of the family were excited. There wasn't very much attention paid to it at all. No, there wasn't anything else happening except that our home was burning up and my mother was burning to death. Yes, Mr. Moyer was sent for and after that, he broke in the window. All he did was to bust in the window. I never called to my mother at all."

Mr. Moyer, Mr. Stockton, and other witnesses for the state who were there that night, testified that they smelt the odor of coal-oil, and some of the jurors who served on the first trial of the case, testified that they smelt the odor of coal-oil on the pieces of the nightgown and underwear then introduced in evidence in the trial of the case. Dr. Kettlecamp, for the defense, who was called and arrived on the scene shortly after the fire, testified, however: "When I got there I went into

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the kitchen. I found the body of Mrs. Riggs there and made a partial examination at that time. I was there about thirty minutes. I can't say that I smelled the odor of kerosene, burned kerosene at that time. The odor of burned flesh was so strong in the room and was so predominant, I don't recall having smelled kerosene."

Several witnesses, both doctors and chemists, testified in defense that a chemical analysis of the pieces of the nightgown and underwear would demonstrate conclusively the presence of kerosene, but no evidence of any such analysis having been made was introduced either by the prosecution or the defense, and Dr. Armstrong for the defense testified: "If I thought that there was an odor of kerosene on the body and wanted to be positive as to whether or not kerosene had been used, I would turn the clothing over to a chemist and have an analysis made. That would determine positively. I wouldn't put much reliance on my sense of smell in a case of life or death. I would say that if coal-oil had been used on this body, it could have been readily detected by the odor of the body when the autopsy was performed. Where petroleum is used upon a body and burned, the body has a characteristic odor for days, and some of the residue or burned tissues of the body could be taken to a chemist and it could be positively ascertained whether or not kerosene had been used." And Doctor Graham, who attended the autopsy, states positively that there was no smell of kerosene about the body. The autopsy disclosed among other things, the following: The height of the deceased was four feet eight inches. Her body was badly burned, except the lower extremities from the knees down, and a strip of skin from the seventh cervical to the third lumbar vertebra, varying from four to six inches in width. The hair was coiled at the back of the head; the hair-pins were in the coil of hair. The eyelids were closed; the tongue protruded between the clenched teeth; and there was a suggestion of smoke in the lungs. Both cavities of the heart

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were empty and contracted. The blood was bright red in appearance and quite fluid. The brain was very soft and friable; the calvarium was intact and did not present any signs of fracture. The aponeurosis and under surface of the scalp did not present any signs of contusion. There was a clot of burned blood in the left temporal fossa, where the outer flesh had been burned away to the temporal bone. Both cavities of the heart were empty and contracted and nothing was found pathologically in the heart, it being normal in size and shape. Dr. Allard, who performed the autopsy and the only medical witness for the state, on direct examination as to the cause of death, said: "I found the organs of the body in a normal condition. The axillary space in the body is under the arms. The seventh cervical is that portion of the back bone which is most prominent, on the ordinary individual, right at the top part of the thorax, between the shoulders. The lumbar region is the small of the back. The hair was burned away excepting the coil at the back of the head. The skin on the face and head was badly scorched. It was burned, but not burned through, except in the temporal regions, and on both sides of the head, it was burned to the bone. The ears were burned away. The teeth were locked on the tongue. There was no diseased condition in the heart. Everything was normal and there was no diseased condition anywhere that could have caused death. When I say the brain was soft and friable I mean it was easily broken. The parietal lobes of the brain are the most superior portions of the brain. By the calvarium, I mean the skull. The aponeurosis is the dense connective tissue membrane which is right over the skull. In order to put the brain in the condition found in the autopsy, it would take a considerable amount of heat. I have an opinion as to the cause of death. I believe the woman died of suffocation, while in an unconscious condition, caused by some violence. The violence was applied to her head in the left temporal region.

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“Q. Doctor, can you account for a woman’s body lying on the floor burning, on boards, for the deep burning in the gluteal folds, from simply the floor or boards burning on the side, the depth that you found those burns, can you account for the depth from that mere fact?

“A. No, sir.

“Q. If I would assume that coal-oil had been poured upon the body, then tell the jury whether you can account for it.

“A. I would say that such a burn would be possible. If coal-oil were poured upon a body lying upon its back, it would naturally run down in that region. I have had some experience in treating burns and have read some concerning treatment. After I made the autopsy, I went back the next day and dissected the neck. I did that because I was trying to find some signs of strangulation, to account for certain conditions found here in the lungs. I presume suffocation caused the tongue to protrude. It is caused by the person trying to get air. There would be several reasons why she couldn’t get air. It might be a simple choking or something inside the throat; it might be due to some external means cutting off the supply of air, such as strangulation or holding the hand over the mouth, or something like that, or in case of fire, the smoke would cut off the supply of oxygen. There was no evidence of any physical strangulation. I examined the blood vessels in the abdomen and they were apparently normal. The bright red fluid blood was quite general through the body. The heart was contracted for the same reason that your [her] other muscles were contracted, due to heat, application of heat. The condition of the blood, as to its color, was probably due to carbon monoxide in the blood. It would have to be inhaled by the person and go through the lungs. Carbon monoxide is a chemical combination, the result of imperfect combustion. Well, for instance, in a furnace, where your coal has been smouldering, due to coal dust, there is no flame there to change your carbon monoxide to carbon dioxide and it

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is heavily saturated with carbon monoxide, which is poisonous to a human being, or animals in general. I don't know if that answers your question or not. I lost track of your question. The generation of carbon monoxide gas is the combustion of material having a large amount of carbon, such as coal or oil, wood, to a less extent. I don't think that a great deal of carbon monoxide could come from the burning of mere clothing.

"Q. In order, Doctor, to have burned the head in the condition that you found it at the time, the hairs all burned off, and taking into consideration the brain in the condition in which you found it, would that ordinarily be expected from a body simply lying on the floor, from fire, the boards catching fire?

"A. No, sir. If coal-oil were used, you would have a different condition there. I couldn't find any fracture of the skull in the temporal region, but it is not necessary to have a fracture for the purpose of causing an injury which results in a blood clot. In the temporal region, everything was burned down to the skull."

Further, he testified: "The flexing of the hands and arms was due to fire, heat. I don't recall finding any soot in the lungs. The appearance of soot in the lungs is the general post mortem finding where there is suffocation from flame and smoke. I think the contracted condition of the heart was caused in the same way as the contraction of the other muscles. I believe the heat was intense enough to contract the heart. Ordinarily, where death is due from suffocation, or from any form of asphyxia, the cavities of the heart are congested and full of blood, especially on the right side, and this blood is dark blood. The only reason I have for saying now why the heart was in the condition in which it was found is the heat; also because I believe that carbon monoxide poisoning was experienced. The blood is often bright red from burns of any character. I don't know whether you find it that way when

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there is no carbon monoxide present. I wouldn't want to say whether it might not be bright red without carbon monoxide. I don't know."

And he admitted that at the former trial he said: "That death resulted here likely from some violence, such as a blow on the side of the head in the region of the left temporal bone, and that following this, either from direct strangulation or strangulation from smoke, the death resulted." He also admitted that at the coroner's inquest he testified: "That death was caused by the inhalation of some very heavy irritant volatile gas." Further he admitted that he stated to counsel for the defendant and to several physicians, that there was no sign of physical violence upon the body of the deceased, and he does not deny that he told Doctors Armstrong, Barrett and Graham, just a few days before the first trial and some months after the autopsy, that he had no idea what caused the woman's death except burning. All of the doctors mentioned gave testimony for the defense to the effect that Dr. Allard had made substantially such statement to them.

The evidence on the part of the defendant as to the cause of death was given by Doctors Armstrong, Barrett, Wernham and Graham, the last named of whom helped perform the autopsy. All four of these witnesses expressed opinion that the cause of death was due to burning, and it is noteworthy, that although the names of Doctors Graham and Barrett were indorsed on the information as witnesses for the state, they were not called by the prosecution. They all testified that the burning could reasonably have been accidental. On this subject Doctor Armstrong testified:

"Q. Assuming, Doctor, that the following facts exist and are true, and they be so found by the jury in this case, to-wit, that the body of a well-developed female is found on the kitchen floor of her home, with the head, face, neck, thorax and abdomen badly charred from burning, that the said adult female, at the time of such burning, and of her death, was

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clothed in a suit of underwear, the same being fleece lined, and over said suit of underwear she had on an outing flannel nightgown, and that said clothing, or especially the outing flannel nightgown, is highly inflammable, could death have reasonably occurred if such clothing had caught fire accidentally and from the fire so caused alone?

“A. Yes, I think so. Death was sudden and came from a shock caused by the burns. I would consider that she breathed just a few seconds. I can't discover any other reasonable cause of death except one due to shock. The contracted heart indicates that death was due to shock, and the lungs being only slightly congested would indicate that. If the deceased had lived for an appreciable length of time, there would have been a strong odor of smoke in the lungs and the air tract would have been intensely congested and full of mucus and it would have been sooty.”

Dr. Barrett, answering the same question, testified: “Yes, sir. Considering the findings as detailed in the hypothetical question, I would say the person lived a very short time. What I mean by ‘short time’ is that death, for all practical purposes, was almost instantaneous.”

Dr. Wernham, answering the question, testified: “Yes, sir.”

And Dr. Graham, testifying of his own knowledge, said: “Knowing how she was clothed, I would say that if she had caught fire accidentally, death could have occurred from the catching afire alone, and without any other cause.”

The state's theory is that the deceased was unconscious at the time she was burned; that that unconsciousness was brought about by a criminal act and that act was the act of the defendant. It was thought the deceased was chloroformed and then placed upon the kitchen floor, and that idea apparently prevailed with the state until the report made by the chemist at Bozeman. But how did the deceased become unconscious? She must have been unconscious or the state had no case, for the body was still intact when found and an

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autopsy had been performed. She certainly would not allow the defendant to burn her if she had her senses. It was beyond the range of probability that she lay down and then touched a match to her own garments. Whether conscious or unconscious, she would have writhed from pain when the fire struck her body. There had to be a state of unconsciousness or there was no case. However, the evidence shows that Dr. Allard, at the autopsy and afterward, had told a number of people, including members of his own profession, that "*there was no sign of physical violence upon the body, and that he could not account for the death of the deceased except by burning.*" At the trial he spoke of strangulation, but admitted that there was no evidence of direct strangulation. At first he said that death was due to the inhalation of some very heavy irritant volatile gas. This was at the time of the autopsy. He said nothing then of physical injury. He had just examined the body; everything was fresh in his mind. After that, all would be memory. The conversation with the doctors took place two months after the autopsy, and just before the other trial. Yet he said nothing to them of a blood clot or of strangulation, or anything that would indicate that he had an idea as to how the woman met her death. He admitted that at the time of the autopsy he paid no attention to the blood clot. Further, Dr. Armstrong said that he talked with Dr. Allard a great many times concerning the matter, between the autopsy and the ninth day of May, 1918, and that Allard never said anything concerning a blood clot. At the former trial, apparently it was not clearly brought out as to the kind of clot this was, but on the second trial, it clearly appears that it was not a blood clot typical of violence. Even Allard admits this, and Graham, who was present and helped perform the autopsy, says that it was not a typical blood clot indicating violence, and that he thought it was simply a little clot caused by the heat.

As derived from the opinion of expert witnesses, there were a number of features which seemed to negative the theory of the state as to defendant's guilt, for instance: There was just a trace of smoke in the lungs, the heart was contracted and there was no coagulated blood therein, the blood in the body was red and fluid. It would appear as though the deceased just gasped and fell over dead. She didn't move; the eyelids were closed; the tongue was protruding; she caught the tongue between the teeth as she gasped. There was only one other way for the tongue to get out in the manner indicated and that was by strangulation, and from the evidence there was no strangulation in this case. The contracted heart was admitted by all to mean death by shock. Had she been knocked unconscious, she would have moved violently when fire was applied to her body until she died, and her tongue would have fallen back in the mouth rather than protruded. Then there was a box of matches tipped over on the stove as though a hand had reached out in the dark and spilled them. Monoxide gas could not easily have been produced under the conditions, and at any rate not in sufficient quantity to produce death. If she were dead when the fire started, she could not have inhaled any gas, for there was neither respiration to carry the gas into the body nor circulation to carry it through the body. If the defendant was guilty of violence on the person of the deceased, when and where did he administer it?

The state rested its case on the assumption that a blow was administered to the deceased in the region of the middle fossa, on the left side. There was no fracture of the skull there; there was no rupture of the meningeal artery and it is not disputed—the state having put in no rebuttal—that there could not, in all probability, be a blood clot in that position produced by a blow in that vicinity unless the skull had been fractured, and there positively could not be a clot unless the artery, or some of its branches, had been ruptured.

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There is no evidence to show, in any way, that a blow was administered to the deceased. No instrument was found with which such a blow might have been delivered; no evidence of injury to the defendant's hands; no fracture of the skull, and not even a contusion of the scalp. The eyes were normal, the pupils evenly dilated, and the clot itself does not indicate violence. Moreover, the testimony of the witness Maddox is undisputed. That witness says it is not probable that the defendant could have struck the deceased with his fist and caused unconsciousness, but that if he did hit her so powerful a blow on the bony structure of the skull, there would be an injury to his hand which would be noticeable.

The autopsy shows "there is a clot of burned blood in the left temporal fossa, where the outer flesh has been burned away to the temporal bone." This we now know is untrue, the witness Allard admitting that it is not a statement of the facts. He and Dr. Graham and a witness named Schlosser all say that there was a little frothy, bubbly clot, about as big as a dime or a nickel, on the inside of the skull, and Dr. Allard said: "*If she fell, and fell on the back of her head, a clot of blood might have been produced anywhere in the front of the head. I don't know whether the blow was struck in the immediate vicinity of the middle fossa or not. If the blood vessels in that vicinity are ruptured, the skull is usually fractured, and I could not find any fracture here.*"

Further, he stated: "In order to have a blood clot there, there would have to be a rupture of a blood vessel in that region. There could not be a clot there without a rupture of the artery or some of the veins in that vicinity. I did not find any rupture of the artery. * * * It was not a normal clot, such as you would expect." And again, he stated: "*The clot probably produced unconsciousness.*"

There is no testimony even touching a criminal agency in this case, other than that of Dr. Allard. Without a state of unconsciousness produced by a criminal agency, there is no

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evidence whatever upon which a conviction can stand. Yet, there is no evidence in the record that the supposed clot on the inside of the skull of the deceased produced unconsciousness. This witness said: "*Probably.*" Moreover, the medical witnesses for the defense all state, in their judgment, that even though there was a clot of this character, it probably would not produce unconsciousness.

• In view of this, what reliance can be placed on Dr. Allard's testimony, that there was violence applied in the region of the middle fossa? Not only would reasonable men be in doubt as to a state of unconsciousness, but if they had to decide upon such evidence, they would have to come to the conclusion that there was not a state of unconsciousness. This, however, is simply from the state's evidence alone. Doctors Armstrong, Barrett, Wernham and Graham all testify that if the deceased had been unconscious, she would have moved violently upon the floor until death came, and they give their reasons for such belief, and those reasons are sound and irrefutable, and they gave illustrations from their own practice where one who is unconscious responds immediately to pain, and all testify that it is only a state where an anesthetic is given that the person would not respond to pain. Moreover, the state's evidence shows conclusively that the deceased did not move from where she lay on the floor, after getting there. She was not unconscious, but dead, immediately after her body came in contact with the floor.

The fact that the defendant did not make more of an effort to save his wife creates only a suspicion, and that is overcome by his sending Chester to Moyer's for aid; by his breaking into the window of the house and attempting to make an entry and calling to his wife; by his going to Stockton's for assistance; by reason of the fact that the deceased was on the bare floor of the kitchen and not in bed; by his telegraphing to her mother and sending for a doctor and the coroner; and the further fact that he did nothing to accelerate the fire

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so as to cover the crime, were he guilty of crime. It may also well be remarked, it is surprising and beyond comprehension, why Opal and the others over the age of discretion, paid so little attention to their mother, under the circumstances. This is the great mystery. None of them thought of mother. No explanation is made or attempted to be made in the evidence; we can make none.

Men do not ordinarily call witnesses to the result of their criminal acts. "His conduct in leaving his wife in an adjoining building and running away to alarm the neighborhood may not unfairly be attributed to his lack of moral fibre or physical courage in the abject fear which overcame him when he discovered that the fire could not be extinguished." (*State v. Bass*, 251 Mo. 107, 157 S. W. 782.)

If a conviction may be had upon inferences or conjectures, then why is Opal not equally as guilty as her stepfather? Her conduct the night of the fire is just as unexplainable as his, and her opportunity for commission of the crime just as favorable. Admittedly she expressed no anxiety or concern for her mother, while though belated, he did in fact try to enter the house and called to his wife. The strange thing is that none of the children, young or old, seemed to have any thought or care for their mother at the time of the conflagration, although it appears that she was a good mother to them. The entire case is shrouded in mystery and the conduct of the father and all of the children seems most unnatural.

We are committed to the doctrine that "a defendant may [2] not be convicted on conjecture, however shrewd, on suspicion, however justified, on probability, however strong, but only upon evidence which establishes his guilt beyond a reasonable doubt; that is upon proof such as to logically compel the conviction that the charge is true." (*State v. McCarthy*, 36 Mont. 226, 92 Pac. 521; *State v. Postal Tel. Co.*, 53 Mont. 104, 161 Pac. 953; *State v. Taylor*, 51 Mont. 387, 153 Pac. 275; *State v. Sieff*, 54 Mont. 165, 168 Pac. 524; *State v. Mullins*,

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55 Mont. 95, 173 Pac. 788; *State v. Brower*, 55 Mont. 349, 177 Pac. 241; *State v. Riggs, supra*; *State v. Schrack*, 60 Mont. 70, 198 Pac. 137; *People v. Ahrling*, 279 Ill. 70, 116 N. E. 764.)

Our statute, section 8298 of the Revised Codes, provides: [3] "No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant as alleged, are established as independent acts; the former by direct proof and the latter beyond a reasonable doubt." In construing this statute, this court has held, and it is our view, that in prosecutions for murder, proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but it proves neither the identity of the person alleged to have been killed, nor the killing by the person accused. (*State v. Calder*, 23 Mont. 504, 59 Pac. 903; *State v. Nordall*, 38 Mont. 327, 99 Pac. 960; *State v. Pepo*, 23 Mont. 473, 59 Pac. 721.)

The general rule in homicide is that the criminal agency—[4, 5] cause of the death,—may always be shown by circumstantial evidence. But in order to sustain a conviction, proof of the criminal agency is as indispensable as the proof of death. The fact of death is not sufficient; it must affirmatively appear that the death was not accidental; that it was not due to natural causes, and that it was due to the act of the defendant. Where it is shown by the evidence on one side, as in the case under consideration, that death may have been accidental, or it may have been the result of natural causes, or due to suicide, and on the other side that it was through criminal agency, a conviction cannot be sustained. Proof of death cannot rest in the disjunctive. It must affirmatively appear that death resulted from criminal agency. (1 Wharton's Criminal Evidence, 10th ed., p. 649.)

The court in Instruction No. 29 correctly told the jury they "should be convinced by the evidence beyond a reasonable doubt of the criminal agency involved in the commission of

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the crime charged; that is, of the manner in which the death of the deceased was accomplished." The evidence falls far short of meeting the requirements of this instruction as to the law, in that it does not appear as to how the death of the deceased was accomplished. And where the circumstances [6] relied on to prove that death was caused by the criminal act of a person, other than the deceased, are consistent with the theory that death was produced by natural causes, there is failure of proof. (*Dreessen v. State*, 38 Neb. 375, 56 N. W. 1024.)

Where an act may be attributed to a criminal or an innocent cause, it will be attributed to the innocent cause rather than the criminal one. (*People v. Ahrling*, 279 Ill. 70, 116 N. E. 764.)

The evidence is entirely circumstantial, and in our opinion is not adequate to support the verdict, the testimony not being sufficiently strong and convincing to exclude every rational hypothesis other than the defendant's guilt.

Section 7853 of the Revised Codes provides as follows: "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which though true, does not of itself conclusively establish the fact, but which affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact from which the fact in dispute is inferred."

Direct evidence differs from circumstantial, in this, that in the former witnesses testify directly of their own knowledge of the main fact or facts to be proven; while the latter is the proof [8] of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind: *State v. Avery*, 113 Mo. 475, 21 S. W. 193; or, as it is stated in *Beason v. State*, 43 Tex. Cr. App. 442, 69 L. R. A. 193, 67 S. W. 96: "The distinction between circum-

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stantial evidence and direct evidence is that in the first instance the facts apply directly to the *factum probandum*, while circumstantial evidence is proof of a minor fact, which, by indirection, logically and rationally demonstrates the *factum probandum*."

Circumstantial evidence is divided into two classes: (1) Certain, or that from which the conclusion necessarily follows: and (2) Uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning. (Greenleaf on Evidence, 14th ed., sec. 13a; *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147, 21 N. E. 525.)

The relative advantages of circumstantial and direct testimony are pointed out by Chief Justice Shaw in the leading case of *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711, in the following words: "Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is, that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is, whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood."

The court then discussed circumstantial evidence, saying: "The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions, a

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source of error not existing in the consideration of positive evidence.”

While all evidence is more or less circumstantial, there is a difference between facts of a particular nature, giving rise to presumptions, and evidence which is direct consisting in the positive testimony of witnesses, to events and occurrences, and the difference is material according to the degree of exactness, the relevancy, weight of circumstances, and the credibility of the witnesses.

But where a conviction is sought solely upon circumstantial [9] evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis. (*State v. Woods*, 54 Mont. 193, 169 Pac. 39; *State v. Suitor*, 43 Mont. 31, 114 Pac. 112; *State v. Slothower*, 56 Mont. 230, 182 Pac. 270; *People v. Ahrling*, *supra*.)

The nature of circumstantial evidence being such that a certain conclusion or state of facts is sought to be inferred from the establishment of other facts, it is necessary, not only that the guilt of the accused be consistent with those facts, but they must exclude every reasonable hypothesis other than his guilt; or as it is sometimes expressed, they must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused. The reason for this is, that as long as the circumstances are capable of two or more explanations, one consistent, and the other inconsistent with his innocence, the evidence does not fill the test of moral certainty, and is therefore insufficient to convict.

The same degree of certainty is required to warrant a [10] conviction on circumstantial evidence as when the evidence is direct, and the jury are required in all criminal cases to be satisfied beyond a reasonable doubt of the guilt of defendant. (*State v. Ryan*, 12 Mont. 297, 30 Pac. 78.)

In the decision on the former appeal of this case, Mr. Justice Holloway well said: “The evidence is not only intrinsically

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deficient, but its legal insufficiency is emphasized by the facts which it fails to prove or tends to prove. So far as disclosed by the record, the theory upon which the state proceeded was that Mrs. Riggs had been dealt a violent blow on the side of the head sufficient to render her unconscious; that her body was then moved from the front room, where she had been sleeping, to the kitchen, laid upon the floor, her clothing saturated with kerosene, a fire started, and that she was suffocated by the smoke. There is not even a scintilla of evidence to support any other theory. There is not any evidence of a telltale bludgeon with which the blow was struck; no evidence that defendant's hand showed signs that he had struck her with his fist; no evidence of blood or the odor of kerosene on his clothing; no evidence of a struggle or outcry; no evidence of any motive on the part of the defendant. There was no contusion on the head of the deceased and no evidence upon the undersurface of the scalp that a blow had been administered. Although defendant slept in the second-story bedroom with eight children, including Opal, the stepdaughter, aged eighteen, and a witness most unfriendly to defendant, there is not a suggestion that anyone heard him leave his bed or the room from the time he retired at 8:30 until the fire was discovered.

"The evidence does not exclude the theory of accidental burning and death from shock. Granting, for the sake of argument, that the facts and circumstances raise conjectures, suspicions and probabilities inconsistent with the theory of defendant's innocence—and I insist that they do not do more— * * * .

"The verdict in this case can rest only upon mere suspicion born and nurtured in the abhorrence which the jury must have felt for a man so brutal in his conduct toward his wife and so cowardly that he would not incur greater risk to save her from their burning house."

The evidence is wholly insufficient, not only to fix the crime upon the defendant, but to show beyond a reasonable

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doubt that there was a criminal agency employed. It amounts to no evidence at all.

We are not unmindful that we are limited on our review to an examination of the record to determine whether there is any substantial evidence to justify the verdict. (*State v. Popa*, 56 Mont. 587, 185 Pac. 1114.) But where the evidence [11] is unsubstantial, or is wholly lacking in material particulars, or where it is meager, fragmentary, disconnected and speculative, as in this case, it is insufficient; and when a conviction results, based on such testimony, this court will not hesitate to set aside the verdict. In our opinion the verdict in this case was the result of passion and prejudice, aroused by that which the defendant did not do, rather than what he did do, on the night of the tragedy, the wanton disregard of the defendant for the safety of his wife under the circumstances. It is far better that a guilty man should go unpunished, than that an innocent person suffer punishment based on such evidence.

For the reasons stated the cause is reversed and remanded, and it is ordered that the case be dismissed and the defendant discharged.

Reversed.

ASSOCIATE JUSTICES COOPER and HOLLOWAY concur.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICE REYNOLDS: The evidence is unsatisfactory, so much so that as members of the jury to which it was submitted, we should have been unwilling to agree to a verdict of guilty. Even so, the legitimate function of this court is that of review to ascertain whether the evidence as it appears in the dead record is sufficient to furnish a substantial basis for an inference of guilt and not to determine its weight. This is exclusively the function of the jury.

After an examination of the evidence, due allowance being made for the fact that the jury observed the witnesses and

heard them testify, we are impelled to the conclusion that the verdict should not be disturbed. There is substantial evidence, the probative value and force of which has not, in our opinion, been taken into account by the majority of the court. It seems to us that this, taken together with all the other evidence, tends to establish, to the exclusion of every other rational hypothesis, not only that the decedent was killed by violent means, but also that she was killed by the defendant.

It will serve no useful purpose to set out and analyze the evidence. We are content, therefore, to go no further than to record our dissent.

EBELING, RESPONDENT, v. BANKERS' CASUALTY CO.,
APPELLANT.

(No. 4,457.)

(Submitted September 20, 1921. Decided October 10, 1921.)

[201 Pac. 284.]

Accident Insurance — Change of Occupation — Increase of Hazard—Contracts—Liability of Insurer.

Accident Insurance — Temporary Change of Occupation — Increase of Hazard—Extent of Insurer's Liability.

1. Where, at the time the insured applied for and was issued an accident insurance policy, he gave his occupation as proprietor of and meat-cutter in a butcher-shop, classified as less hazardous than that of tender of livestock in transit, the contract providing that in case he was injured after change of occupation to a more hazardous one or in doing any act or thing pertaining to any occupation classified as more hazardous, the company would pay only such portion of the indemnity as the premium would have purchased for the more hazardous occupation, and he was injured while temporarily acting as live-

1. Accident insurance—Provision for forfeiture or reduction of benefits in event of injury while engaged in more hazardous occupation, or variations of the provision, as applied to occasional or temporary acts, see note in **L. R. A. 1915D, 312.**

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stock tender and while in the act of watching trainmen repair a break in the locomotive, the insurer was liable only for the smaller amount provided for the occupation of tender of livestock in transit.

Same—Contracts—Duty of Courts.

2. Courts cannot make new contracts for parties but must construe and enforce them as they are made, if not in contravention of public policy or violative of express provisions of law.

Same—Change of Occupation—What Constitutes.

3. From the time the shipment of livestock was started on its journey until it reached its destination, the cattle composing it were in transit and the insured, whose regular occupation was proprietor of a butcher-shop and meat-cutter, but who temporarily acted as tender, was a caretaker or tender in transit.

Appeals from District Court, Big Horn County; Charles A. Taylor, Judge.

ACTION by Jessie W. Ebeling against the Bankers' Casualty Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Order affirmed. Judgment modified and affirmed on condition.

Messrs. Nichols & Wilson, for Appellant, submitted a brief; *Mr. Harry L. Wilson* argued the cause orally.

There can be no question as to the validity or enforceability of a provision in an accident insurance policy to the effect that in the event of increased occupational hazard the insurance shall be decreased proportionately. (*Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105.) The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. (*Keyte v. Commercial etc. Assur. Co.*, 149 Mass. 116, 3 L. R. A. 508, 21 N. E. 361; *May on Insurance*, secs. 172, 245; see, also, *Robinson v. Mercer County etc. Ins. Co.*, 27 N. J. L. 134; *American Ins. Co. v. Leonard*, 80 Ind. 272; *Standard Life & Acc. Ins. Co. v. Carroll*, 86 Fed. 567, 41 L. R. A. 194, 30 C. C. A. 253; *Loesch v. Union Casualty & Surety Co.*, 176 Mo. 654, 75 S. W. 621; *Aldrich v. Mercantile*

3. What constitutes breach of condition of accident policy relating to occupation of insured, see notes in 7 *Ann. Cas.* 568; *Ann. Cas.* 1916B, 739.

Mut. Acc. Assn., 149 Mass. 457, 21 N. E. 873; *Employers' Liability Assur. Corp. v. Back*, 102 Fed. 229, 42 C. C. A. 286; *Standard Life & Acc. Ins. Co. v. Taylor*, 12 Tex. Civ. App. 386, 34 S. W. 781.)

Mr. T. H. Burke, for Respondent, submitted a brief and argued the cause orally.

It is well settled in actions on insurance policies, where the answer admits the loss but alleges a breach of conditions, the burden of proof is on the defendant. In this case, the burden of proof was switched to the defendant and it must sustain that proof by the preponderance of the evidence.

The defendant seeks to escape liability for the maximum amount because of a certain provision in their policy [see opinion]. In *Stone's Admr. v. United States Casualty Co.*, 34 N. J. L. 371, cited in L. R. A. 1915D, page 112, a similar provision was construed contrary to appellant's contention. From the time of the steer incident until the accident, and at that time, the occupation of the insured was that of a proprietor of a meat-shop and all of his acts related back and to that occupation, unless it might be said that he was doing an act pertaining to the occupation of a "spectator," if there be such an occupation. In any event, he was not doing any act pertaining to the occupation of "tender in transit" when the injury occurred.

It is our contention that during all of the time the occupation of the insured remained "proprietor and meat-cutter in shop," but that during the life of the insurance, he might have been and was engaged in various acts, some of which pertained to his occupation and others to various other occupations. But on the completion of each of said special acts, all of his ordinary acts would revert back to and be acts of his general occupation. If Ebeling had been injured while he was in the act of raising the steer, then the contention of counsel might have weight. Each of his acts are to be judged by themselves, and

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the evidence shows that when he raised the steer ten minutes before the fatal accident, that act was the last thing done in his life pertaining to the occupation of "tender in transit." His standing beside the engine had nothing more to do with "tender in transit" than if he were a paid passenger on the train. (See, also, *Holiday v. American Mutual Acc. Assn.*, 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

William O. Ebeling was insured under a policy which classified occupations according to their respective hazards, and designated the amount of insurance which a given premium paid in advance would purchase upon the life of one engaged [1] in any of the different occupations so classified. Ebeling's occupation was given as a "proprietor and meat-cutter in shop," and was included in class D. The occupation of "tender in transit" of livestock was included in class X. The annual premium paid by Ebeling would purchase insurance to the amount of \$1,100 upon the life of one engaged in a class D occupation, whereas it would purchase but \$275 upon the life of one engaged in a class X occupation. The policy contained the following provision: "In the event that the insured is injured or contracts sickness after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate, but within the limit so fixed by the company for such more hazardous occupation."

About August 30, 1917, Ebeling engaged as a tender in transit of a shipment of livestock from Little Horn, Montana,

to Omaha, Nebraska. When the train reached Owen, Wyoming, on August 31, the locomotive became disabled and the train stopped. Ebeling and the other stock tenders went from the caboose toward the forward end of the train to give attention to a steer that was down in one of the cars and assist it to its feet. When that work was accomplished, they went to the locomotive and stood about watching the trainmen in the work of repair, and while they were so engaged a cylinder head was blown out, striking Ebeling and inflicting injuries from which he died. Plaintiff, the beneficiary named in the policy, brought this action to recover \$1,100. The defendant company tendered \$275, but the tender was refused. The trial resulted in a verdict and judgment for the amount claimed by the plaintiff, and the defendant appealed therefrom and from an order denying a new trial.

There is not any conflict in the evidence, and for all practical purposes this appeal may be considered as though the case had been submitted upon an agreed statement of facts. The only question for determination is: Was the insured, at the time of his injury, doing any act or thing pertaining to the more hazardous occupation, tender in transit? If he was, the amount of recovery must be reduced to \$275. If he was not, the judgment must be affirmed. There is not any conflict of authority respecting the general rules of law applicable to a case of this character, but some conflict growing out of the application of well-settled rules to the facts, and this conflict or confusion arises from the proper construction of the provision in policies which diminishes liability in the event that the injury occurs while the insured is doing any act or thing pertaining to an occupation classified as more hazardous than the one for which the insured was accepted. The earlier accident policies provided only for diminished liability in the event the insured, at the time of his injury, had changed his occupation to one classified as more hazardous, and the courts held generally that the term "changed" was employed in the sense of substitution,

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that the performance of an isolated act pertaining to a more hazardous occupation did not constitute a change of occupation, and that the insurance company could not claim the right to have the indemnity diminished by reason of the fact that the insured was injured while in the performance of such isolated act. The leading cases so holding are *Stone's Admr. v. United States Casualty Co.*, 34 N. J. L. 371; *North American etc. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212; *Baldwin v. Fraternal Acc. Assn.*, 21 Misc. Rep. 124, 46 N. Y. Supp. 1016; *Id.*, 29 App. Div. 627, 52 N. Y. Supp. 1136, affirmed 159 N. Y. 561, 54 N. E. 1089; *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 66 Am. St. Rep. 49, 41 L. R. A. 467, 53 Pac. 918. Later the courts held that, if the act being done at the time the injury was received was one which fairly pertained to the regular employment of the insured, it could not be held that he had changed his occupation by reason of the fact that the act pertained, also, to a more hazardous employment. (*Thorne v. Casualty Co.*, 106 Me. 274, 76 Atl. 1106.) Finally, the courts were called on to consider policies containing the provisions quoted above, and in *Smith v. Massachusetts Bonding & Ins. Co.*, 179 N. C. 489, 102 S. E. 887, it was held that, if the act being done by the insured at the time of his injury was one pertaining directly to his own occupation, the liability of the insuring company would not be diminished by reason of the fact that the act pertained also to a more hazardous undertaking.

In *Holiday v. American Mutual Acc. Assn.*, 103 Iowa, 178, 64 Am. St. Rep. 170, 72 N. W. 448, and in *Zantow v. Old Line Acc. Ins. Co.*, 104 Neb. 655, 178 N. W. 507, recovery was permitted in each instance for the face of the policy, under circumstances not materially different from those involved in the present inquiry, and those two cases are the only ones disclosed by our research which would warrant recovery in this case for the larger amount. We are unable, however, to appreciate the reasoning in either case, or to approve the method by which the conclusion was reached.

In effect, the Iowa court read out of the policy the provision for diminished liability in the event the insured is injured while doing any act or thing pertaining to a more hazardous occupation, or failed to distinguish between a policy containing [2] such provision and one which omits it. It is our judgment that courts are not constituted to make new contracts for parties or to alter existing ones. Their function is to construe and enforce contracts as they are made, so long as they do not contravene public policy or violate express provisions of the law.

The Nebraska court construed the provision to apply only in the event the act or thing pertains *peculiarly* to a more hazardous occupation, thereby restricting materially its operation or effect.

It would appear reasonable that if the parties intended that the only act or thing, the doing of which would operate to diminish liability in case of injury, should be one pertaining peculiarly or exclusively to the more hazardous occupation, they would have employed some apt term to indicate such purpose, and the fact that they did not do so leads naturally to the conclusion that they intended just what the terms they did employ fairly signify. This policy makes the character of the occupation to which the act pertains, and not the character of the act itself, determine the extent of liability. It does not provide for a diminished liability only in the event the insured is injured while doing an extrahazardous act or thing pertaining to a different occupation, but does provide for diminished liability if, at the time of the injury, the insured is doing *any* act or thing pertaining to a more hazardous occupation. The adjective "any" means one indifferently out of an unlimited number (Webster's International Dictionary), and therefore, if the act or thing being done by the insured at the time of the injury pertains to a more hazardous occupation, it is wholly immaterial that such act itself, if standing alone, would be harmless, or fraught with no danger whatever. By

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no possible process of reasoning can the language employed be tortured into any other meaning, and, since the parties so expressed themselves, they must abide the consequences. From [3] the time this shipment was started on its journey until it reached its destination, the livestock composing it were in transit, and Ebeling was a caretaker or tender in transit. (*Loesch v. Union Casualty & Surety Co.*, 176 Mo. 654, 75 S. W. 621.) It may be conceded that the isolated act of tending this particular shipment did not constitute a change of occupation within the meaning of the policy, but if it did not constitute an act or thing pertaining to the occupation of a tender in transit, it is only because the terms employed are utterly incomprehensible.

But the meaning of the contract is not obscure; on the contrary, it is too plain to admit of doubt. We are not alone in this conclusion. The decided weight of authority sustains our view. In each of the following cases: *Thomas v. Mason's Fraternal Acc. Assn.*, 64 App. Div. 22, 71 N. Y. Supp. 692, *Lane v. General Acc. Ins. Co.* (Tex. Civ. App.), 113 S. W. 324, and *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509, the insured was injured while hunting, an occupation classified as more hazardous than the one for which he was accepted, and in each instance it was held that, though the insured had not changed his occupation, he was doing an act or thing pertaining to the more hazardous employment, and therefore the recovery should be limited to the amount which the premium would purchase upon the life of one engaged in such more hazardous undertaking. In *Montgomery v. Continental Casualty Co.*, 131 La. 475, 59 South. 907, the insured, a draftsman with office and traveling duties only, was injured while doing the work of a machinist, an occupation classified as more hazardous, and the decision was in harmony with the views expressed in the cases last cited above.

The order denying a new trial is affirmed. For the reasons given, the cause is remanded to the district court, with direc-

tions to modify the judgment by reducing the amount thereof to \$275 as of the date of the original judgment, and, when so modified, it will stand affirmed. The appellant will recover its costs of this appeal.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

WILLIAMS, RESPONDENT, v. MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK, APPELLANT.

(No. 4,447.)

(Submitted September 19, 1921. Decided October 10, 1921.)

[201 Pac. 320.]

*Life Insurance—Fraudulent Representations—Concealment of
Prior Medical Treatment—Policy Void.*

Life Insurance—Application—Fraudulent Representations—Concealment of
Prior Medical Treatment—Policy Void.

1. In his application for a life insurance policy which provided, among other things, that the statements of the insured, in the absence of fraud, should be deemed representations and not warranties, the applicant represented that the only illness or disease he had had since childhood was a slight cold, and that he had consulted, or been treated by, only one physician for five years last past. The evidence showed that four months before making these statements on his medical examination he had been treated by two physicians and was present at a consultation respecting his case held between the two and a third, that the treatment was not for a cold but for a serious ulcer of the throat of syphilitic or tubercular nature. Insured died of tubercular laryngitis some four months after issuance of the policy. *Held*, that the representations, accepted and acted upon as true by defendant to its prejudice, were as to material facts affecting the risk, intended to mislead and therefore fraudulent, justifying the insurer in avoiding the policy.

1. Misrepresentation by insured as avoiding life insurance policy, see note in *Ann. Cas.* 1915A, 460.

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Same—Fraud—When Question of Fact—When of Law.

2. The question of fraud is always a question of fact for the jury, unless the evidence is uncontradicted and it is impossible to draw any inference from it other than that it entered into the particular transaction, whereupon it becomes one of law for the court.

Appeals from District Court, Beaverhead County; Jos. C. Smith, Judge.

ACTION by Ruby R. Williams against the Mutual Life Insurance Company of New York. Judgment for plaintiff, new trial denied, and defendant appeals from the judgment and the order. Reversed and remanded, with directions.

Mr. F. C. Fluent and *Mr. Charles R. Leonard*, for Appellant, submitted a brief; *Mr. Leonard* argued the cause orally.

It needs no argument to establish the fact that no insurance company could insure a man who a few months previous had been treated for an ulcerated throat which might be of a tubercular nature any more than a fire insurance company would insure a building which was on fire.

The false answers of insured voided the policy. (*Gardner v. North State Mutual Life Ins. Co.*, 163 N. C. 367, Ann. Cas. 1915B, 652, 48 L. R. A. (n. s.) 714, 79 S. E. 806; *Gordon v. Prudential Ins. Co.*, 231 Pa. St. 404, 80 Atl. 882.)

The parties had a right to contract in the policy covering the conditions under which the policy should take effect and one of the conditions was that the insured should be actually in good health at the time of the issuance of the policy. That is a reasonable provision in an insurance policy and, in fact, a necessary one, for the very existence and security of life insurance companies is based upon the good health of the insured, and all of its calculations and mortuary estimates are based upon the fact that its policies are written upon lives of persons in good health. (*Metropolitan Life Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908; *Packard v. Metropolitan Life*

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Ins. Co., 72 N. H. 1, 54 Atl. 287; *Perry v. Security Life & Annuity Co.*, 150 N. C. 143, 63 S. E. 679.)

The answer of the applicant for the policy having been untrue and the matter material, and the maker of the statement necessarily knowing it was untrue when he made it, the intention to deceive the insurer is necessarily implied as the natural consequence of such act. (*Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 28 L. Ed. 76, 3 Sup. Ct. Rep. 507 [see, also, Rose's U. S. Notes]; *Northwestern Mut. Life Ins. Co. v. Montgomery*, 116 Ga. 799, 43 S. E. 79; *Boddy v. Henry*, 126 Iowa, 31, 101 N. W. 447; Kerr on Fraud, p. 55.)

Messrs. Rodgers & Gilbert, for Respondent, submitted a brief; *Mr. Harry G. Rodgers* argued the cause orally.

The law applicable to the pleadings and the facts in this case has been pronounced by this court in the case of *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778. There it is said: "When, therefore, the statements are mere representations, the transaction becomes a matter of fair dealing on the part of the insured; and, if it appears from the application that the questions put to the applicant call for information founded upon his knowledge or belief, a misstatement or omission to answer will not avoid the policy, unless the answer is made knowingly and willfully with intent to deceive." And again: "Therefore, if the insured intentionally conceals facts which are material, or makes false representations with reference to them, intending to mislead the insured, he is guilty of actual fraud, which at the option of the latter, avoids the policy. Such a fraud, however, is always a question of fact for the jury (Rev. Codes, sec. 4980), and unless the condition of the evidence is such that only one inference may be drawn from it, the court may not direct a verdict."

The cases cited by appellant in support of its contention are not in point. In the case of *Metropolitan Life Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N. E. 908, the provision that the

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insured should be in good health at the time of its delivery was contained in the policy itself, and not in the application. The same is true of the case of *Packard v. Metropolitan Life Ins. Co.*, 72 N. H. 1, 54 Atl. 287. In the case of *Perry v. Security Life & Annuity Co.*, 150 N. C. 143, 63 S. E. 679, the policy had not been accepted by the insured for the purpose of taking effect, and he was under no obligation to pay the premium. Furthermore, the defendant had, by the issuing of a conditional receipt, waived the requirement that insured should be in good health at the time of the delivery of the policy.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

This action was commenced to recover of defendant the amount alleged to be due upon an insurance policy upon the life of the deceased husband of plaintiff. Trial was had before a jury, which rendered a verdict in favor of plaintiff. Judgment was entered in accordance with the verdict. Motion for new trial was made and overruled. Defendant has appealed from the judgment and from the order overruling the motion.

On January 10, 1917, the insured, Oscar H. Williams, made application to the defendant company for insurance upon his life. On January 23, 1917, he passed the medical examination, and on February 5, 1917, the policy was issued. Insured died on the 28th of June, 1917, as a result of tuberculosis laryngitis.

The defendant admits the execution of the policy, but makes [1] two separate affirmative defenses: First, that the policy was procured through fraud; and, second, that insured was not in good health at the time of payment of first premium and at the time of the delivery of the policy, the same being alleged as conditions precedent to the policy taking effect. In our disposition of the case, it is only necessary to consider the first one of these defenses.

The policy contains this paragraph: "This policy and the application herefor, copy of which is indorsed hereon or

attached hereto, constitute the entire contract between the parties hereto. All statements by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor and a copy of the application is indorsed on or attached to this policy when issued."

At the time of the examination of insured, he was required to make answer to a number of questions submitted by the medical examiner as a part of the application. In making answer to some of these questions, he stated that the only illnesses, diseases, injuries, or surgical operations that he had had since childhood were a fracture of the right thigh in 1904, a slight cold in September, 1916, of a duration of only from two to three days, and with complete recovery in September, 1916, an injury to right eye in 1899. He also stated that the only physician who had prescribed for or who had treated him, or with whom he had consulted in the past five years, was Dr. McMillan, of Dillon, in September, 1916, for the cold above mentioned, and that he was at the time of his examination in good health. The undisputed testimony shows that these answers of insured did not correctly state the facts. It appears conclusively that he had received treatments not only from Dr. McMillan, but also from Dr. Thorkelson in September and October, 1916, and was present at a consultation over his case between these two doctors and Dr. Jones at about the same time; that the treatments he received were not for "cold" as that term is commonly understood, but for a serious ulcer in the throat. At the consultation between Drs. Thorkelson, McMillan and Jones, the question was discussed as to whether or not this ulcer was syphilitic or tubercular in nature. At that time a smear was taken from his throat and examined to determine whether or not the ulcer was a specific one, which test showed negative. The Wasserman test was also made for the

same purpose which showed negative. This latter test was made upon the suggestion of the insured on account of the history of his case. No test was made to determine whether or not it was tubercular. The testimony is disputed as to whether or not it was tubercular at that time, although it is admitted that he died the following June of tuberculosis laryngitis. However, the facts were conclusively established that the malady was a serious one, much more serious than is implied by the term a "cold," and that the insured knew that the physicians who were treating him so considered it. These facts were very material as bearing upon the risk that the company was assuming in writing his insurance, and it is hardly conceivable that if the company had known the real situation, it would have accepted the risk without first satisfying itself that the ulcer was nothing more than a mere local infection that would quickly pass away.

Construing the paragraph of the policy above mentioned, in the light of these facts, it is for this court to determine whether or not such misrepresentations shall be deemed fraud and construed as warranties affecting the validity of the policy. This court had a similar question under consideration in the case of *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778, in which the rule applicable to this case was laid down as follows: "That upon the payment of the first premium it [the policy] became a contract binding upon the defendant, unless the latter could show that it was induced to issue it by actual fraud practiced upon it by Pelican, in failing to answer fully and fairly each question propounded to him, according to his best information and belief. * * * This being so, the burden was upon defendant to show, not only that the representations were untrue, but were made with the intent to conceal the condition of Pelican's health, and that defendant would not have issued the policy but for the fraud thus practiced upon it. 'Each party to a contract of insurance must communicate to the other,

in good faith, all the facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.' (Rev. Codes, sec. 5570.) Therefore, if the insured intentionally conceals facts which are material, or makes false representations with reference to them, intending to mislead the insurer, he is guilty of actual fraud, which, at the option of the latter, avoids the policy. Such a fraud, however, is always a question of fact for the jury (Rev. Codes, sec. 4980), and, unless the condition of the evidence is such that only one inference may be drawn from it, the court may not direct a verdict. The inquiry is: First, as to the truth of the representations; second, if untrue, whether they were intended to mislead; third, whether the adverse party accepted them as true and acted upon them; and, fourth, was he prejudiced? (*Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950.) The concealment of the material fact is equivalent to a false representation that it does not exist."

We cannot escape the conclusion that the insured made false statements with knowledge of their falsity; that the defendant accepted his representations as true, acted upon them, and was prejudiced. The concealment on his part of the facts that he [2] had been treated from May until October of 1916, a part of the time at least, for an ulcer which he knew was suspected to be either tubercular or syphilitic in nature, and that he had consulted Drs. Thorkelson and Jones and had been treated by Dr. Thorkelson, constituted misrepresentation as to material facts affecting the risk and was fraudulent, thereby justifying the insurance company in avoiding the policy. The evidence upon this feature of the case being uncontradicted and it being possible to draw only one inference from it, there is presented a question of law for the court and not a question of fact for the jury. The fraud being conclusively established, the evidence was insufficient to sustain a verdict in favor of plaintiff.

For this reason the judgment and order overruling motion for new trial are reversed, and the cause is remanded to the trial court with directions to enter judgment in favor of defendant.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

ROWE ET AL., APPELLANTS, v. EMERSON-BRANTINGHAM
IMPLEMENT CO., RESPONDENT.

(No. 4,446.)

(Submitted September 19, 1921. Decided October 10, 1921.)

[201 Pac. 316.]

*Contracts — Sales — Warranties—Breach—Varying by Parol—
Cancellation of Instruments—Prerequisites.*

**Sales—Written Contracts—Warranties—Varying by Parol—Evidence—In-
admissibility.**

1. In an action for damages for breach of a clause of a written contract of sale of a threshing-machine warranting it as being as well made, of good material, and that with proper use and management it would do as good work as any other machine of the same size manufactured for the like purpose, evidence of statements made by defendant's agent in making the sale that it would thresh and clean alfalfa as well as any other machine of the same size, etc., was properly rejected as an attempt to vary the terms of the written instrument by parol.

**Same—Warranties—Breach—Failure of Notice of Defects—Effect on
Right to Recover.**

2. Failure of a buyer of a threshing-machine to meet the requirement of the contract making it incumbent upon him, if dissatisfied,

1. Parol evidence to show warranty outside of the contract of sale, see note in 5 Am. St. Rep. 197.

2. Necessity that abandonment or rescission of written contract for sale of goods be in writing, see note in Ann. Cas. 1918C, 1213.

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to give written notice to the seller within a certain time or return the machine to the place at which he took it into his possession, bars him from recovering for breach of warranty.

Cancellation of Instruments—Prerequisites—Pleading and Proof.

3. In an action for the cancellation of notes given for the purchase of farm machinery, absence of allegation and proof that plaintiff had restored everything of value he had received from defendant debars him from recovery.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

ACTION by Wearn Rowe and others against the Emerson-Brantingham Implement Company. Judgment for defendant, and from an order refusing a new trial, plaintiffs appeal. Affirmed.

Mr. H. S. McGinley, for Appellants, submitted a brief.

This case presents but one question, and that is: When a written contract is obtained from a buyer by a seller of a manufactured article, which article may contain latent defects, and such article is sold by contract, without the buyer having an opportunity to examine the same, and purchases the same for some special purpose, and is induced to enter into such written contract by oral statements and representations made by the seller or his agents, that the article about to be sold will do and perform the special work for which it is desired, can evidence of such oral statements and representations and inducements, so made by the seller or agent, to the buyer, thereby inducing him to enter into such contract, be introduced where such written contract is silent as to the special purposes for which the article was bought? In the case of *Snyder v. Holt Mfg. Co.*, 134 Cal. 324, 66 Pac. 311, 312, the supreme court of California answered the question in the affirmative. And in the case of *Lichtenthaler v. Samson Iron Works*, 32 Cal. App. 220, 162 Pac. 441, the same court held that the terms of section 1770 of their Civil Code (sec. 5110, Rev. Codes), is to be read

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into the contract, where representations were made that such property would do and perform certain work, and where such property was purchased for such special purposes, thus confirming their previous decision in *Snyder v. Holt Mfg. Co.*, *supra*. (See, also, *Imperial Gas Engine Co. v. Auteri*, 40 Cal. App. 419, 180 Pac. 946.)

Messrs. McKenzie & McKenzie, for Respondent, submitted a brief; *Mr. John R. McKenzie, Jr.*, argued the cause orally.

Citing: *J. I. Case Threshing Machine Co. v. Copren Bros.*, 32 Cal. App. 194, 162 Pac. 647, 648; *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653; *Murphy v. Russell & Co.*, 8 Idaho, 133, 67 Pac. 421; *Berlin Machine Works v. Midland Coal & L. Co.*, 45 Mont. 390, 123 Pac. 396.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was brought to recover damages for a breach of warranty of the quality and fitness of a threshing-machine of a specified make, and to cancel the notes given for its purchase price. The original written order was executed September 6, 1915, and contained the usual provisions intended to safeguard the interests of the seller. The answer admits the sale, but denies the breach. It also sets forth a counterclaim in which it is alleged that the notes sought to be canceled were executed and delivered to evidence the purchase price of the machine, and that the mortgage thereon was given as security for the notes. A decree foreclosing the mortgage is also asked.

Appellants' counsel limits the inquiry to the single question [1] of the admissibility of oral representations, not embodied in the ultimate written contract, warranting the capacity of a thresher of a specified make to thresh and clean alfalfa. The warranty set forth in the contract was that the thresher was "well made, of good material, and with proper use and management" would "do as good work as any other machine of the same size, manufactured for a like purpose."

The trial court, upon objection, excluded all evidence touching the prior statements and representations of the local agent in making the sale, and denied the plaintiffs' offer to prove the following facts: That the plaintiffs had no previous experience with a machine of the character in question; that their attention was not called to any portion of the written contract, except those designating the machinery and attachments purchased; that they had no opportunity to examine the machinery before its receipt, and that, while it was being operated by one of defendant's experts, one of the screens was blown to pieces owing to defects in its manufacture; that prior to the threshing season of 1916 the plaintiffs notified the defendant, through its local agent, of that fact; that defendant agreed at divers times to replace the defective parts and to put the thresher in running order so that it would thresh and clean alfalfa seed; but that up to the time of the commencement of the action, defendant having failed to live up to its agreement, plaintiffs notified it that they would consider the contract at an end by reason of the breach of warranties, and that they (the plaintiffs) have since that time *held the machine* "subject to instructions from the defendant as to where to ship and deliver the same." Thereupon the plaintiffs rested. The court adjudged the aggregate amount of the notes to be due and owing from plaintiffs, and rendered and entered judgment foreclosing the mortgage given as security therefor. This appeal is from an order refusing plaintiffs a new trial.

One of the grounds upon which plaintiffs seek to evade payment of the notes is that they were not given an opportunity to examine the machine before its delivery, and that the breaking of one of the screens proved a violation of the provisions of sections 5109, 5110 and 5111 of the Revised Codes, to the effect that a seller of an article of his own manufacture warrants it to be free from latent defects; that improper materials have not knowingly been used in its manufacture; that it is reasonably fit

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for the purpose for which it was sold, and that its inaccessibility to the buyer carries a warranty that it is sound and merchantable. It is true that these provisions enter into and become a part of the contract; nevertheless they are to be construed in connection with the express stipulations of the agreement. If defects in the machinery are later discovered, the contract specifies the things which shall be done by the buyer in order to afford the seller an opportunity to repair the breaks or supply the missing parts. They are as follows: "It is also agreed and understood that no agent or employee of said company (officers of the company not included) is authorized to alter, change, modify, or waive this warranty, or any part thereof, or to make any other or different warranty, or that any notice to any agent or employee of said company, or any act at any time, of any agent or employee, shall not constitute a waiver of the written notices herein provided for, nor a waiver of any other stipulation in this warranty. Workmen, salesmen, and mechanical experts employed by said company in and about starting, adjusting, and repairing said machinery are not agents of said company, and it is hereby mutually agreed that said company is not bound by any statements, promises, or declarations made by them or any of them in reference to said machinery. * * * It is hereby expressly agreed that all claims for damages against said company, by reason of the non-performance of machinery above, are hereby waived." It is also provided that failure to give the written notice of defects within six days from date of its first use or to return the machinery to the place whence it was received within the same period "shall be conclusive evidence of the fulfillment of the warranty, and full satisfaction of the purchaser, who agrees to make no claim thereafter against said company, or to make any defense to the notes given therefor on account of any breach of the warranty."

If in the warranty that the machinery ordered is "to be well made, of good material, and with proper use and management

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to do as good work as any other machine of the same size manufactured for a like purpose" was comprehended a warranty that the thresher to be furnished would thresh and clean alfalfa as well "as any other machine of the same size manufactured for a like purpose," the written contract was complete and must be taken as a full expression of the agreement between the parties. This is so because therefrom it will be presumed that every material item and term has been placed therein. In such case parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids addition by parol where the writing is silent, as well as to vary where it speaks. (2 Phillips' Evidence (Cow. & H. Notes), 669; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873; *Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064; Rev. Codes, secs. 5018, 7873.)

The law controlling a written contract becomes a part of it, and cannot be varied by parol any more than what is written. (2 Phillips' Evidence (Cow. & H. Notes), 668; *Thompson v. Libby*, *supra*.) Our Code sections above referred to merely declare the common-law rule in definite and crystallized form. In *Armington v. Stelle*, *supra*, a case wherein it was sought by a contemporaneous oral agreement to include a mining claim not specified in the written lease of other claims, the following statement from *Naumberg v. Young*, *supra*, is adopted: "Where the written contract purports on its face to be a memorial of the transaction, it supersedes all prior negotiations and agreements, and * * * oral testimony will not be admitted of prior or contemporaneous promises on a subject which is so closely connected with the principal transaction,

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with respect to which the parties are contracting, as to be part and parcel of the transaction itself, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract.”

In *Kelly v. Ellis, supra*, the question involved was whether an oral promise said to have been made by one of the defendants that the plaintiff should be the general manager of the sheep ranch in question was one of the essential elements of the contract as finally written. In reaching a conclusion that the oral promise was collateral to the principal agreement Mr. Justice Holloway, expressing the opinion of this court, very aptly remarked: “Unfortunately for plaintiff, he consented to the writing of April 17, which completely superseded the prior oral negotiations, including the promise to employ him, and the statutes of this state now forbid him to say that there ever was any oral promise for his employment.”

There is no allegation in the complaint that the plaintiffs did not understand the contract as written, nor that its contents were misrepresented; their whole claim being that the local agent of the defendant said certain things concerning the capacity of the machine before the agreement was signed. Upon this statement plaintiffs predicate their claim that defendant committed a breach of its warranty. The final written agreement “must be considered, therefore, as containing all the terms of their contract which had been agreed upon at the time the written contract was executed.” (*Arnold v. Fraser, supra.*)

The contention that, because “the written contract is silent as to the special purpose for which the machine was bought,” the parol understanding between the local agent and the plaintiffs can be read into it, is likewise without merit. In *Seitz v. Brewers’ Refrigerator Co.*, 141 U. S. 517, 35 L. Ed. 837, 12 Sup. Ct. Rep. 48 [see, also, Rose’s U. S. Notes], cited in the case of *Armington v. Stelle, supra*, it is said: “Whether the written contract fully expressed the terms of the agreement

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was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

The rule invoked is that, where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. (Benjamin on Sales, sec. 657; Addison on Contracts, Bk. 2, Chap. 7, p. 977; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *District of Columbia v. Clephane*, 110 U. S. 212 [28 L. Ed. 122, 3 Sup. Ct. Rep. 568]; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108 [28 L. Ed. 86, 3 Sup. Ct. Rep. 537 (see, also, Rose's U. S. Notes)]; *Hoe v. Sanborn*, 21 N. Y. 552 [78 Am. Dec. 163]; *Deming v. Foster*, 42 N. H. 165.) See, also, *Gladding, McBean & Co. v. Montgomery*, 20 Cal. App. 276, 128 Pac. 790; *Bruner v. Hegye*, 42 Cal. App. 97, 183 Pac. 369. This is in accord with our Code sections upon the subject above referred to.

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To allow a claim of this sort to be maintained where the parties have put their engagements in writing, would be to treat the agent's oral statements as warranties, and to completely ignore the rule that parol agreements leading up to the written contract are merged in it.

The right of the parties to make retention of the property [2] by the purchaser conclusive evidence that the warranty has been fulfilled to the satisfaction of the purchaser was upheld and declared to be "automatic and conclusive" by this court in *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653. Having been freely made, without deceit or fraudulent representation, and plaintiffs having neither alleged nor attempted to prove compliance with its express requirements relative to notice and return of the machinery or its defective parts to the place at which they took it into their possession, the contract must be enforced as it is written.

The gravamen of the charge is that, because the defendant [3] failed to maintain the warranties set forth in the written instrument, plaintiffs are not liable on the notes in question. The prayer of the complaint is for damages on account of the breach and cancellation of the notes, the mortgage, and the contract upon which they are based.' Having failed to establish a breach of warranty, as well as to allege and prove restoration of everything they have received under their agreement (Rev. Codes, sec. 5065; *Como Orchard Co. v. Markham*, 54 Mont. 438, 171 Pac. 274; 18 Ency. Pl. & Pr. 829), plaintiffs are not entitled to relief upon either ground.

The order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

McCAULL-WEBSTER ELEVATOR CO., RESPONDENT, v.
ROOT, APPELLANT.

(No. 4,432.)

(Submitted September 14, 1921. Decided October 10, 1921.)

[201 Pac. 319.]

*Void Contracts — Sales — Absence of Consideration — Lack of
Mutuality—Options.*

1. An agreement to sell and deliver wheat between certain dates, "buyer's option," by the terms of which the buyer did not bind himself to accept it when offered, which lacked both consideration and mutuality, and which was immediately withdrawn upon refusal of the buyer to make part payment understood by the seller to be made upon its execution, was neither a contract of sale, a contract of sale and purchase nor an option contract.

Appeals from District Court, Fergus County; Jack Briscoe, Judge.

ACTION by the McCaull-Webster Elevator Company against A. O. Root. From a judgment for plaintiff, and an order overruling his motion for a new trial, defendant appeals. Reversed and remanded, with directions to dismiss.

Mr. E. K. Cheadle and Mr. Thos. F. Arnett, for Appellant, submitted a brief; Mr. Cheadle argued the cause orally.

The contract in question is executed by one party only, to-wit, the appellant. It is void for want of mutuality, because under this contract the appellant could not have compelled the respondent to accept the wheat and to pay the price of \$1.30 per bushel for it. There is an entire absence of consideration. There is no promise, either express or implied, to be fulfilled by the respondent, the McCaull-Webster Elevator Company, and no money or valuable thing passing from respondent to appellant as consideration for the agreement of the appellant to sell and deliver the wheat. If this view be correct, the

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instrument was simply an option and not a contract of sale. Still less was it an agreement of purchase.

It is not contended that the mere absence of words of purchase from the contract would make it an option instead of a contract of purchase and sale, but there must be something in it from which the inference can legitimately be drawn that the respondent obligated itself to purchase the said wheat. The words "buyer's option" would seem to make it optional with the respondent whether it would buy the grain or not. The contract in question is strictly unilateral, and therefore is not such a contract on which an action can be maintained. (*McDonald v. Bewick*, 51 Mich. 79, 16 N. W. 240; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; *Stensgaard v. Smith*, 743 Minn. 11, 19 Am. St. Rep. 205, 44 N. W. 669; *Wood v. Edwards*, 19 Johns. (N. Y.) 205.)

The transaction between the parties to this action was not a sale. A sale would have been a transfer of the property in the wheat mentioned in the contract for a price in money. No transfer of the property in the wheat was made because no price was given for it, and the transfer of the wheat itself was, of course, never made. Therefore, the contract can be construed only as an option contract for the sale of the said wheat. It is not an agreement of sale because an agreement of sale and purchase is a contract by which one party agrees to sell and the other party agrees to buy the property, the subject of sale, for a price in money, and there is no such an agreement on the part of the respondents in this case. The words "buyer's option" above referred to seem distinctly to make it optional with the respondent whether it would purchase the wheat or not within the dates specified. Under this contract, if there were a consideration for it, the respondent would have only the right to elect to purchase the grain. If the respondent had exercised its "buyer's option," the contract would then have been turned into an agreement of sale and purchase by the appellant to the respondent, but this

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right of election was never exercised within the time limited in the contract. (See James on Option Contracts, p. 11, and cases cited thereunder.)

Messrs. Belden & De Kalb, for Respondent, submitted a brief; *Mr. H. L. De Kalb* argued the cause orally.

The writing raises a presumption of consideration. (Sec. 5010, Rev. Codes.) A consideration is defined by section 5001. In *Noyes v. Young*, 32 Mont. 226, 236, 79 Pac. 1063, this court holds that the consideration need not be alleged or proved independent of the contract. Appellant seems to feel that a consideration must always be a present money consideration. This is not true in Montana or elsewhere, so far as we know. A consideration may consist in a promise for a promise. (*Poughkeepsie etc. Plank Road Co. v. Griffin*, 21 Barb. (N. Y.) 454; 13 C. J. 328.)

It cannot be contended that had Root delivered the grain on the first day of November, 1916, to the respondent he would not have been entitled to receive \$1.30 per bushel, and McCaull-Webster Elevator Company would have been obliged to pay that sum for the wheat. "Buyer's option," as used in this contract, is only the option of the buyer to order the grain in at any time between the twenty-third day of August and the first day of November. On the first day of November, the grain must be delivered in any event. We need not go outside the terms of the contract to determine this. By the terms of the contract McCaull-Webster Elevator Company has not the option to order the grain in at any other time except between the specified dates. If the words "buyer's option" had not been inserted in the contract, Root would have had the right to deliver at any date between the dates named, but would have been obliged to deliver on the last named date. "Where delivery is to be made between certain dates, the seller is not bound to deliver until the last day." (35 Cyc. 177.)

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Where the contract specifies dates, as does this one, between which delivery can be made at buyer's option, the buyer simply reserves the right to require delivery at some intermediate date, but it does not relieve the seller from his obligation to deliver on the last named day. Without the use of the words "buyer's option," a contract of this character, so far as the obligation on the part of the seller is concerned, would be equivalent to the obligation of the maker of a promissory note who agreed to pay the note on or before a certain date, being obligated to pay it on the date, and privileged to pay it sooner, if he saw fit. Here the delivery could not be made sooner than the last date specified, except required by the buyer. See the following cases which illustrate these points: *Harman v. Washington Fuel Co.*, 228 Ill. 298, 81 N. E. 1017; *Croninger v. Crocker*, 62 N. Y. 151; *Conawingo Petroleum Refining Co. v. Cunningham*, 75 Pa. St. 138; *Sousely v. Burns' Admr.*, 10 Bush (Ky.), 87.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal by the defendant from a judgment in favor of the plaintiff, made and entered in an action tried to the court sitting without a jury, and from an order overruling the defendant's motion for a new trial. The complaint alleges that the plaintiff is a corporation and that on or about the 23d of August, 1916, "the plaintiff and defendant entered into an agreement for a consideration as therein expressed, whereby defendant agreed to sell and plaintiff agreed to purchase for the sum of \$1.30 per bushel 1,000 bushels of wheat," and that defendant promised and agreed to deliver the same to the plaintiff at its elevator in Geraldine, Montana, on or before the first day of November, 1916, but that defendant neglected and refused to comply with the terms of the contract and the plaintiff was damaged thereby. To this complaint the defendant filed his answer, admitting the execution of an agree-

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ment on August 23, 1916, for the sale of a quantity of wheat to the plaintiff at \$1.30 per bushel, but denying that he has sufficient knowledge or information to form a belief as to the terms of said agreement, and for a further answer alleging that he entered into an agreement on the 23d of August, 1916, to deliver certain wheat to the plaintiff and that it was understood and agreed that the plaintiff should pay to the defendant a part of the purchase price; "that defendant would not have signed said contract only upon the inducement of plaintiff that part payment of said grain would be paid upon defendant's signing the same"; that defendant was misled by plaintiff and induced to execute said agreement to deliver said grain; that not any consideration or anything of value was paid to the defendant by the plaintiff for said agreement and that defendant did not deliver any of said grain to the plaintiff."

The agreement referred to in the complaint is as follows:

"Contract—The McCaull-Webster Elevator Co.

"No. 36. Geraldine, Mont., Station, Aug. 23, 1916.

"I, A. O. Root, do hereby sell and agree to deliver to the McCaull-Webster Elevator Company, or their agent, at their elevator, warehouse, or cribs, as they may designate, at Geraldine, station, in Chouteau county, state of Montana, between the 23d day of Aug., '1916, and the 1st day of Nov., 1916, buyer's option, 1,000 bushels of good, sound, dry, and merchantable wheat to grade 2 H. M., for which I am to receive one and 30/100 dollars per bushel; said wheat being now in my possession and free from incumbrance. I do furthermore agree that, in case of default in the delivery of the grain as stipulated above, or by such date as buyer may extend the time of expiration of this contract, to pay as liquidation damages the difference between the price as above stipulated and the market value of same grain and grade on date this contract is closed by the buyer. I do furthermore acknowledge the receipt

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of none dollars as part payment on this sale, and confirm the contract as above made.

“Witness my hand this 23d day of August, 1916.

“Witness: ROBT. FULTON.

A. O. Root.”

At the trial of the case the plaintiff introduced the agreement in evidence, and offered further evidence as to damages suffered by the plaintiff, and rested. The defendant testified to the effect that at the time of signing the agreement “He [Fulton] wanted me to sell some wheat to be delivered in the future, and I finally told him I would do so. He produced the blank form of contract, filled it out, and I signed it. I said to Mr. Fulton, ‘How much do I get down?’ I needed some money at the time; he shoved the contract in his drawer and said, ‘None.’ I answered that ‘I would not have signed the contract if I did not want to raise some money,’ and Fulton replied, ‘We never do.’ I answered, ‘I don’t know much about the laws of Montana, but in some states that contract is not worth the paper it is written on; I would not have to deliver, or you receive or pay for, the wheat.’ Mr. Fulton answered, ‘We don’t pay anything on the contracts.’ He refused to pay me anything on the contracts, and I refused any delivery. * * * I told him that I would not deliver grain on that contract unless he would pay me something on it.” He further testified that the plaintiff did not make any demand upon him for the delivery of the wheat until some time in December, 1916. The defendant rested at the close of Mr. Root’s testimony and the plaintiff did not offer any rebuttal evidence.

The agreement on its face shows that no consideration was [1] paid therefor. The testimony of the defendant is also to the effect that there was not any consideration paid for the agreement and that he signed it with the understanding that a part payment was to be made. By the terms of the agreement the plaintiff does not bind itself to accept the wheat, nor does it make any promise whatsoever. The agreement was

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not "closed by the buyer." The agreement is wholly unilateral, is wholly without consideration, and for that reason cannot be sustained as a contract of sale; neither can it be sustained as a contract of sale and purchase, for it lacks both consideration and mutuality; neither can it be sustained as an option contract, for there was neither consideration nor acceptance thereof within the time named in it, and the same, according to the undisputed evidence of the defendant, was withdrawn immediately after its signing and the refusal of the plaintiff to pay any consideration therefor. (*Id* v. *Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Snider* v. *Yarbrough*, 43 Mont. 203, 115 Pac. 411; *Donlan* v. *Arnold*, 48 Mont. 416, 138 Pac. 775.)

For the reasons herein stated, we recommend that the judgment and order appealed from be reversed and the cause remanded to the district court, with directions to dismiss the action.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded to the district court, with directions to dismiss the action.

Reversed.

WORTMAN ET AL., APPELLANTS, v. LUNA PARK AMUSEMENT CO., RESPONDENT.

(No. 4,436.)

(Submitted September 15, 1921. Decided October 10, 1921.)

[201 Pac. 570.]

Ejectment—Corporations—Sale of Property—Board of Directors—Powers—Cross-examination—Technical Violation of Rule—Harmless Error.

Ejectment—Plaintiff must Prevail upon Strength of Own Title.

1. In ejectment, plaintiff must prevail, if at all, upon the integrity of his own title, and not the infirmity of that of defendant.

Same—Cross-examination—Technical Violation of Rule—Harmless Error.

2. A technical violation of the rule of cross-examination in permitting defendant company to show affirmatively by plaintiff's witness that title to the property in question was in it and not in plaintiff—a vital issue in the case—was not reversible error in the absence of a showing of prejudice.

Same—Corporations—Boards of Directors—Power to Sell Assets—Statutes.

3. Under the common-law powers reserved to corporations by the proviso in section 3897, Revised Codes, and enumerated in a general way in sections 3833 and 3889, the board of directors of a going corporation could, in the proper pursuit of its business and within the purposes of its creation, against the dissent of a minority of its stockholders, sell a leasehold interest in realty with improvements thereon, and where such sale was made before plaintiffs had judgment against the selling corporation, they acquired no title under execution sale, and nonsuit was properly granted in their action in ejectment against the purchaser.

Appeals from District Court, Silver Bow County; John V. Dwyer, Judge.

ACTION by George H. Wortman and Louis Frank, a copartnership doing business under the firm name and style of the

1. The general rule that plaintiff must recover, if at all, on the strength of his own title is discussed in note in 18 L. R. A. 781.

3. On the power of officers or majority stockholders, against consent of minority, to sell property of corporation essential to its existence as a going concern, see note in 35 L. R. A. (n. s.) 396.

Power of directors to sell property of corporation without consent of stockholders, see note in 5 A. L. R. 930.

George H. Wortman Company, against the Luna Park Amusement Company. From a judgment for defendant and an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Mr. W. D. Kyle and *Mr. Earle N. Genzberger*, for Appellants, submitted a brief; *Mr. Genzberger* argued the cause orally.

A defendant is not permitted to prove his affirmative defense on cross-examination of plaintiff's witness, nor to cross-examine upon matters not touched upon direct examination. (*Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793; *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778; *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673.)

✓ As a sale, the attempted transfer was void, it not having been authorized by the stockholders of the Clearmont Amusement Company, under section 3897 of the Revised Codes. In the alleged sale made by the Clearmont Company to the respondent company, the stockholders of the former company took no action whatsoever, the board of directors thereof alone assuming to authorize it and direct the execution of the proper instruments by its officers. This sale was, therefore, in direct violation of section 3897 of our Code, prescribing the procedure by which a corporation may sell all of its property, including the calling of a meeting of the stockholders to consider the sale of all or a part of the corporate property, and the necessity of "stockholders representing at least two-thirds of the whole number of shares of the capital stock of the corporation, then outstanding and of record on the books of the company," authorizing such sale. As said by this court in the case of *Forrester v. Boston & M. etc. Min. Co.*, 21 Mont. 544, at page 553, 55 Pac. 229, 353: "At com-

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mon law, neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation, able to achieve the objects of its creation, as against the dissent of a single stockholder. This doctrine is firmly established by the authority of adjudged cases, and rests upon the soundest principles."

After this decision, the legislature of this state enacted what is now section 3897 of the Revised Codes, enabling a sale by two-thirds of the stockholders, upon their complying with the provisions of that law. The statement of the supreme court in the *Forrester Case* with reference to the property of mining corporations applies with equal force to section 3897: "There is strong reason to believe that the legislative assembly intended to prevent the alienation of the mining property specified in section 492, in any and all cases without the consent of two-thirds of the shares." Such consent not having been granted by the stockholders of the Clearmont Amusement Company, regarding the sale of its property to the respondent company, such sale is just as void, as were the acts of the B. & M. Co., which were held void in the *Forrester Case*. The sale being void, the appellants, as judgment creditors of the Clearmont Company, had the right to resort to its specific property, for the satisfaction of their judgment. (*McShane v. Carter*, 80 Cal. 310, 22 Pac. 178; *Porter v. Anglo etc. Nat. Bank*, 36 Cal. App. 191, 171 Pac. 845; *Williams v. Gold Hill Min. Co.*, 96 Fed. 454; *Williams v. Gaylord*, 102 Fed. 372, 42 C. C. A. 401; *Id.*, 186 U. S. 157, 46 L. Ed. 1102, 22 Sup. Ct. Rep. 798 [see, also, Rose's U. S. Notes]; *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889, 10 S. E. 1017.)

At the meeting of the stockholders when the action of the board was attempted to be ratified, 18,262 shares were voted in favor of, while 14,930 shares were voted against, the

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proposition. This being but a majority, and not a vote of two-thirds of the outstanding capital stock, necessarily, the transfer of all the corporate property of the Clearmont Company failed of ratification by the stockholders, for if a majority of the shares were without power to authorize the sale, they certainly could not ratify it. (23 Am. & Eng. Ency. of Law, 2d ed., 890; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Pacific Electric Co. v. Los Angeles*, 118 Fed. 746, 753; *Pennsylvania Co. v. Cole*, 132 Fed. 668, 678, 679.)

Messrs. Templeman & Sanner, Mr. Fred. J. Furman and Mr. Leo J. Hanley, for Respondent, submitted a brief; *Mr. Sydney Sanner* argued the cause orally.

Even if the cross-examination complained of by appellant were regarded as technically improper, the error would not be one for which reversal could follow. The business of a court upon the trial of an issue of fact is to ascertain the essential truth of the matter before it. It is desirable, of course, that this should be done in the orderly, logical way; but, if it is done, the mode is of secondary importance and departures from strict propriety become error nonprejudicial in character. This is the necessary result of the statute and of a long line of our decisions. (Rev. Codes, secs. 6593, 7118; *White v. Chicago, M. & P. S. Ry. Co.*, 49 Mont. 419, 143 Pac. 561; *Brophy v. Downey*, 26 Mont. 252, 67 Pac. 312; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *Hanson Sheep Co. v. Farmers' etc. Bank*, 53 Mont. 324, 163 Pac. 1151.)

Appellants contend that the transaction was futile, among other things, because "not authorized by the stockholders of the Clearmont Company under section 3897, Revised Codes." The section is part of an Act (Chap. 103, Laws 1905) entitled "An Act to enlarge the powers of corporations as to disposing of or selling their property," etc., and it is obvious from the title, as from the above provision, that its purpose was not

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to restrict or forbid what had theretofore been permissible. The occasion for its enactment was certain decisions of this court expressing the common law that the sale of the whole of the corporate property of a going and prosperous concern was not legally possible as against the dissent of a single stockholder; but it was also a part of that same common law that a corporation might sell or dispose of a part of its property, and might do so through its board of directors. Especially is this true where the sale is pursuant to its prior contract or in furtherance of its business. (*Forrester v. Butte & M. etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353; *Shaw v. Hollister L. & Imp. Co.*, 166 Cal. 257, 135 Pac. 965; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *People v. President etc. of College of California*, 38 Cal. 166; 1 Clark & Marshall on Private Corporations, p. 436 *et seq.*; 10 Cyc. 764, sec. 13 *et seq.*) Here, then, is one of "the powers of the board of directors in relation to the disposition of property" which section 3897 by its express terms does not restrict. A corporation may still, therefore, dispose of a part of its property through action by its board of directors without observance of section 3897; and it follows that before a sale can be invalidated as contrary to that section, it must appear that the sale was of the whole of the corporate property. (*Shaw v. Hollister Land Imp. Co.*, *supra*; *Bradford v. Sunset Land & Water Co.*, 30 Cal. App. 87, 157 Pac. 20.)

MR. COMMISSIONER SPENCER prepared the opinion for the court.

Action in ejectment. The complaint herein contains the usual allegations of ownership in the plaintiff of certain real property, particularly described as "certain portions of sections 29 and 32, township 3, north of range 7 west, as follows: Lake Avoka situated in the northeast quarter of section 29, township 8, north of range 7 west," together with certain

improvements situated thereon—possession thereof by defendant, demand and refusal to deliver possession, and claim for damages. The answer tenders the general issue. At the close of plaintiff's case, motion for nonsuit was granted, and judgment entered accordingly. Motion for a new trial was denied, and appeal is from the order denying the motion and from the judgment.

The evidence discloses that on May 22, 1911, Tidewater Investment Company, a corporation (hereinafter referred to as Tidewater Company) made and entered into an agreement with Clearmont Amusement Company, a corporation (hereinafter referred to as Clearmont Company) by the terms of which the Tidewater Company leased and let unto the Clearmont Company certain real property situated in Silver Bow county, Montana, a short distance south of the city of Butte, for a period of fifteen years, ending March 31, 1926, and commonly known as Lake Avoka, together with certain privileges to be exercised and enjoyed in connection with the use thereof. On April 16, 1912, the Tidewater Company assigned by indorsement thereon all its right, title and interest in the lease to the defendant, and on the same date deeded to defendant certain lands, which included the lands embraced within the terms of the lease. The lease, among other things, provided in substance that the Clearmont Company should have the right to erect a "dancing pavilion or other improvements designed for public amusement" upon the leased premises, but that such right should be exercised on or before April 1, 1912, and the work to make such improvements diligently prosecuted and completed within a reasonable time thereafter, and that if not so done and prosecuted such right could be declared forfeited by the Tidewater Company, lessor. It was further provided in the lease that if the Clearmont Company did not exercise its right to so construct other and additional improvements the Tidewater Company then had the option for a period of one year from and after April 1, 1913,

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to purchase "the improvements, equipment, fixtures, and all property of the party of the second part [Clearmont Company] had or enjoyed in connection with the premises aforesaid, excluding therefrom only the stock of merchandise of the party of the second part then on hand, for the sum of \$10,000 cash." The evidence further discloses that on November 19, 1913, the defendant notified the Clearmont Company that as assignee of the Tidewater Company it elected to exercise its option to purchase, and tendered \$10,000 cash, and that on November 15, 1913, at a special meeting of the board of directors of the Clearmont Company, the cash tender by the defendant was accepted, and the president and secretary authorized to execute the necessary instruments to consummate the sale. Pursuant to such authority a bill of sale was thereupon made, executed and delivered to the defendant company, which then went into possession. On May 4, 1914, at the annual meeting of the stockholders of the Clearmont Company, all the acts of the directors, stockholders, and officers of the company from the earliest time to that date were ratified, confirmed and approved in every particular. On May 4, 1916, appellants herein obtained a verdict in an action wherein they were plaintiffs and Clearmont Amusement Company was defendant, and judgment was subsequently made and entered thereon. On June 23, 1916, execution was issued, and thereafter the sheriff of Silver Bow county, under authority thereof, pretended to sell to appellants the leasehold interest of the Clearmont Company, as evidenced by the lease hereinabove mentioned, together with all improvements situated thereon, for the sum of \$7,500, and on July 22, 1916, executed certificate of sale thereof to these appellants. On July 26, 1917, the then sheriff of Silver Bow county made, executed and delivered to the appellants a deed for the property mentioned in his return of sale under the execution. It is further shown that the reasonable rental value of the property involved herein is \$1,500 per annum.

Appellants have specified thirteen assignments of error, but all are comprehended in the solution of two questions: First, did the Clearmont Company have title to the property levied upon and sold under execution in June, 1916, at the time of such levy and sale? and, second, was it error to permit defendant to cross-examine plaintiffs' witness for the purpose of showing, not only that plaintiffs had no title to the property in question when this action was commenced, but affirmatively showing that title to the property reposed in defendant?

Discussing these questions in inverse order, it is sufficient to [1, 2] say of the latter that appellants must prevail, if at all, upon the integrity of their own title, and not the infirmity of their adversary's (*McKinstry v. Clark & Cameron*, 4 Mont. 370, 1 Pac. 759; *City of Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817), and hence, at the time of the levy of the writ of execution and the pretended sale by the sheriff of Silver Bow county under the writ, if the Clearmont Company had no title to the property levied upon, the sale was an empty proceeding, the appellants obtained no title, and a nonsuit was inevitable. We think that the appellants in direct examination of their own witness opened the door sufficiently to justify the cross-examination complained of, but, if not, it cannot be said the error was more than a technical violation of the rule of cross-examination upon a vital issue in the case, and therefore not reversible error. (*Hanson Sheep Co. v. Farmers & Traders' State Bank*, 53 Mont. 324, 163 Pac. 1151.)

The remaining question worthy of consideration in the [3] determination of these appeals involves the applicability of section 3897, Revised Codes, invoked by appellants in support of their contention as to the validity of the sale of the property involved by the Clearmont Company to the respondent. In the absence of other objection, if the provisions of section 3897, Revised Codes, do not sustain the contention of appellants in support of their claim, clearly they were without title upon which to base their claim. Prior to the enactment of section 3897, *supra*,

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this court had occasion to construe the various statutes pertaining to the sale of all or a portion of its property by corporations generally (*Forrester v. Boston & Mont. etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353), and in an elaborate and exhaustive opinion by Mr. Justice Pigott laid down both the statutory and common-law rules governing the powers of directors upon such sales. Section 3897, *supra*, was thereafter enacted as a curative measure to obviate what appeared to be patent incongruities in the then existing law, and to prevent small minority stockholders from thwarting the will of the majority in making a sale otherwise valid under common law and for the best interest of the corporation. To summarize some of the rules of common law so far as applicable to the instant case, a solvent and prosperous corporation could sell ✓ all of its assets only by unanimous consent of its stockholders; if insolvent and unable to execute the purposes of its creation, by the directors if the best interests of the stockholders demanded; in the proper pursuit of its business, and within the purposes of its creation, sell any or all assets even against the dissent of a minority or perhaps a majority of its stockholders. (*Forrester v. Boston & M. etc. Min. Co.*, *supra*.) In this case, it is not suggested in the record that the sale in question was of all the assets of the corporation, nor that the corporation was insolvent, but the record affirmatively shows that subsequent to the sale a new board of directors was ✓ elected, and the Clearmont Company continued to live as a corporate entity. The proceedings leading up to and the consummation of the sale of the property to respondent were not in harmony with the general scope and meaning of section 3897, *supra*, which comprehends a sale of all rather than a part of the corporate property, but rather in consonance with the proviso contained therein, reserving to the corporation and ✓ the board of directors the powers granted to them by the common law, and enunciated in a general way in sections 3833 and 3889 of the Revised Codes. Nor can it be said that sec-

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tion 3897, Revised Codes, intended to limit or restrict those powers, for the title of the Act itself declares its purpose to be "to enlarge the powers of corporations as to disposing of, or selling their property," etc., so that its general intent was to grant the corporation more power rather than to limit or restrict, and as further emphasis of this general intent reserved the common-law powers by a special proviso contained therein. Sections 3889 and 3833, Revised Codes, in substance, and so far as applicable here, declare that corporations have power to purchase, hold and convey real and personal property, and that they shall conduct the affairs of the corporation through a board of directors. By failing, either specifically or by fair implication, to alter the common-law rules the common law must still remain the rule of decision (*Forrester v. Boston & M. etc. Min. Co.*, *supra*, and citations), and in the instant case the board of directors of the Clearmont Company, acting under power granted by both the common law and statute, were clearly within their rights, and hence it is of no importance whether respondent assumed to acquire its title by virtue of an option reserved in the lease or otherwise, for the undisputed record is that an offer of \$10,000, accompanied by tender, was made by respondent, accepted by the Clearmont Company, and the property delivered, which is all the law required to make a valid sale. We conclude, therefore, that the Clearmont Company made a valid sale of the property in question to the respondent prior to the levy of execution upon the same property, on behalf of appellants, and that appellants were therefore without title upon which to base their action.

1 no error in the record, and therefore recommend judgment and order appealed from be affirmed.

ELAM: For the reasons given in the foregoing opinion, judgment and order appealed from are affirmed.

Affirmed.

Argued and denied November 7, 1921.

SLACK, RESPONDENT, v. D. E. BROWN, APPELLANT.

(No. 4,444.)

(Submitted September 17, 1921. Decided October 10, 1921.)

[201 Pac. 565.]

Sales—Breach of Contract—Nonsuit—Failure to Stand upon Motion—Appeal and Error—Waiver.

Appeal and Error—Preliminary Motions—Rules of Court—Failure to Object—Waiver.

1. Where preliminary motions and technical objections which should have been raised and settled in advance of the trial under the rules of court were not made by defendant until the commencement of the taking of the testimony on the day of trial, they will on appeal be treated as waived.

Nonsuit—Failure to Stand upon Motion—Waiver.

2. Where, instead of standing upon his motion for nonsuit made at the close of plaintiff's case on the ground of failure of proof, defendant in his cross-examination of plaintiff on rebuttal supplied the defect, he was in no position to predicate error on the refusal of the motion.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by H. I. Slack against D. E. Brown. Judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Messrs. Belden & De Kalb, for Appellant, submitted a brief; *Mr. H. L. De Kalb* argued the cause orally.

Messrs. Blackford & Huntoon, for Respondent, submitted a brief; *Mr. J. C. Huntoon* argued the cause orally.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

Complaint by Slack on written contract, later amended to include *quantum meruit* for sale to Brown of 10,000 bushels

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No. 2 hard Montana wheat, at contract price and reasonable value of ninety cents per bushel.

Performance by plaintiff under the contract and that no payment had been made by defendant, although demanded, save the sum of \$2,500 paid prior to any delivery, alleged.

Defendant denied performance by plaintiff and alleged affirmative defenses to the effect that \$2,500 had been paid by defendant on the contract, contemporaneously with its execution and delivery; that the demand for its return had been refused; that, although he had ordered plaintiff to perform his contract, it was not done; that defendant suffered damages in the sum of \$1,000 because of nonperformance by the plaintiff.

The reply denies the affirmative matters of the amended answer and sets up as further reply the entire transaction in detail, pleading estoppel as to 8,223-30 bushels.

A jury trial was had, the jury returning special findings of fact to the effect that plaintiff delivered the grain mentioned in his complaint under the contract, and that the defendant or his agent received the grain so delivered, and by acts, words or silence led the plaintiff to believe it was being accepted under the contract. There was also returned a general verdict for practically the entire amount demanded. From the order denying a new trial defendant appeals.

Many preliminary motions and technical objections which [1] should have been raised and settled in advance of the trial were made by defendant before the taking of the testimony, on the day of the trial, that will receive no consideration here. They were in violation of the rules of court, and the complained of defects were waived by the acquiescence of the defendant.

The testimony as a whole sustaining plaintiff's contention showed: That on August 12, 1915, the parties entered into the written agreement. That \$2,500 was paid to plaintiff by defendant on the contract before any delivery. That prior to

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signing the contract the parties made an investigation of the fields from which the wheat was to be cut to see if the grain was in condition to harvest and market. That defendant shelled and tried the grain, and both thought it fit to cut on August 15. That on that day, after two loads had been gathered in, Brown and plaintiff concluded it was too soft and green to harvest and postponed harvesting for three days. That on August 15, 18, and 19, 2,020 bushels gross were delivered at the elevator of the defendant, in twelve loads, tickets for three of which were marked "green," "soft and green," "establishing no grade, smut," all of the other tickets for all of the grain delivered being without grade mark. That plaintiff, on receiving the ticket marked "soft and green," went to the elevator and interrogated Watts, defendant's agent, as to its meaning. He replied: "I don't know. That is the order of the boss." That thereupon plaintiff decided to wait until the grain was in the shock before further delivery. That on August 23 defendant authorized the following communication to plaintiff:

"NOTICE:

"To Henry I. Slack, Acushnet, Montana.

"You are hereby notified to complete your contract with David Brown, wherein you agreed to deliver ten thousand bushels of 2 hard Montana wheat at his elevator at Acushnet, Montana. And you are further notified that unless you complete the conditions of the said contract, executed and delivered on the 12th day of August, 1915, we will take such proceedings as we deem necessary, in the courts, with the state grain inspection department, and with the railroad over which you may attempt to ship your wheat so contracted for by David E. Brown."

"Dated August 23, 1915.

"JOHN JACOB JEWELL,
"Attorney for David E. Brown."

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That on September 30, 1915, defendant wrote his agent, Watts, as follows:

“Referring to Slack’s deal, use good tactics. Talk kindly but profound. 1. First point, convey this idea. If he can’t deliver grain of contract he may demand to pay contract price. 2. Shape him to make best out of it. You can pay list for enough to settle bill. His wheat must be a three at least get one and one-half pounds dockage. Use another theory. You can take ten thousand bushels, 3 H. at a 2 H. list price. If he would consent to this, then issue new contract and destroy old one. The list must absolutely demonstrate price upon day of transaction, and notify me at once. Deeply insist on one and one-half pounds dockage, so long as you taking a 3 H. at a 2 H. price. Divide your twenty-five hundred dollars by the list price. Upon day of settlement be sure your list is in for that day. Then add your dockage, that will give gross bushels. List to-day is seventy-four cents, twenty-five hundred divided by seventy-four cents equals the result of the division, will be net bushels, then add your dockage which should be one and one-half pounds, for shrinkage, and allowing one grade.

“D. E. BROWN.”

That the balance of the grain was delivered October 11 to 15, inclusive; that all the grain delivered under the contract was No. 2 hard Montana wheat; that defendant had, without objection, received all of the wheat and sold the same, after mixing it with other wheat, as No. 3 hard Montana, without consulting the plaintiff.

In spite of the pleaded estoppel the court permitted testimony for defendant to show that the wheat was of a lower grade than that demanded by the contract, and properly, under suitable instructions, put the matter into the hands of the jury to determine as a matter of fact if defendant was estopped.

At the close of plaintiff’s case defendant moved for a non-[2] suit, the material ground of which was failure of proof. It is true that under plaintiff’s case in chief the only evidence

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bearing on the performance of the contract as to the grade of the grain was that the wheat was delivered on contract and "to fulfill the terms of my agreement with Mr. Brown." But defendant cured this defect himself, if it was a defect, by supplying the missing evidence in cross-examination of the plaintiff when called on rebuttal, as follows: "I don't know whether Mr. Watts said he had any authority to accept anything less than No. 2. I don't know whether he said anything about that or not, but of course that was what my contract called for, what I was delivering No. 2. That is what I was supposed to deliver, No. 2. I didn't expect Mr. Brown to take anything short of No. 2." Had defendant confidence in his motion for nonsuit, he would and should have stood on it. But he proceeded with the defense and certainly cannot predicate error when he himself made a record by his cross-examination of the very matter he contended was not in evidence.

This court has passed on the peril of proceeding after such a motion in *Pure Oil Co. v. Chicago, M. & St. P. Ry. Co.*, 56 Mont. 266, 185 Pac. 150; *Melzner v. Chicago, M. & St. P. Ry. Co.*, 51 Mont. 487, 153 Pac. 1019; *Yergy v. Helena Light & Ry. Co.*, 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310.

There are many assignments of error, some of which are based on the motions and objections had on the day of the trial, and prior to the taking of testimony. The others are based on the instructions given by the court. There is no merit to any of them. The case was fairly tried, and the jury properly found for plaintiff on the contract.

For the reasons herein stated, we recommend that the order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion the order appealed from is affirmed.

Affirmed.

Rehearing denied November 7, 1921.

MUNGER, APPELLANT, v. NELSON, RESPONDENT.

(No. 4,451.)

(Submitted September 19, 1921. Decided October 10, 1921.)

[201 Pac. 286.]

*Default Judgments—Counterclaims—Failure to Reply—Trial—Continuance—Minutes of Court—Presumptions—Bills of Particulars.***Judgment by Default—Counterclaim—Failure to Reply.**

1. A default may be entered for failure of plaintiff to reply to a counterclaim.

Same.

2. Under section 6560, Revised Codes, a reply to a counterclaim must be filed within twenty days after service and filing of the answer; hence where a reply was not filed until nineteen months after the expiration of the twenty-day period and fourteen months after default had been entered, the court did not err in disregarding the belated pleading on motion for judgment on the counterclaim.

“Default”—Failure to Appear—Effect of Entry of Default.

3. Entry of the “default” of a party for failure to appear at the trial of the cause in legal effect amounts to no more than a declaration that he was not personally present.

Trial—Continuance—Minutes—Presumption of Correctness—Conclusiveness.

4. The presumption that the minutes of the court showing that counsel for plaintiff was notified of the continuance of his cause until a certain hour the following day, at which hour defendant offered proof of his counterclaim and was awarded judgment, were correct, *held* not overcome by conflicting affidavits of opposing counsel.

Bill of Particulars—Failure to Furnish—Effect.

5. Failure to furnish a bill of particulars in a cause where a bill may properly be demanded bars the delinquent party from being heard at the trial.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by Fred R. Munger against Andrew J. Nelson.
Judgment for defendant and plaintiff appeals. Affirmed.

Mr. Ralph J. Anderson, for Appellant, submitted a brief and argued the cause orally.

The motion to set aside plaintiff's default for failure to file a reply should have been granted because the proper remedy

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when the plaintiff fails to reply is a motion for judgment on the pleadings. (31 Cyc. 607; *Benicia Agricultural Works v. Creighton*, 21 Or. 495, 28 Pac. 775, 30 Pac. 676; *Dunham v. Travis*, 25 Utah, 65, 69 Pac. 468; 11 Ency. Pl. & Pr. 1035; 6 *Id.* 76.) The motion for judgment on the pleadings should have been denied because the reply of plaintiff was on file at the time of the hearing, and no motion to strike the reply was ever filed or made. A motion for judgment on the pleadings should not be granted, if there is an issue framed by the pleadings and a judgment granted on the pleadings in such a case is error. (*Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631; *Bach, Cory & Co. v. Montana etc. Produce Co.*, 15 Mont. 345, 39 Pac. 291.) On the showing made, it was an abuse of judicial discretion on the part of the trial court to refuse to set aside the default. (*Brown v. Weinstein*, 40 Mont. 202, 105 Pac. 730; *Pengelly v. Peeler*, 39 Mont. 26, 101 Pac. 147; *Jones v. Jones*, 37 Mont. 155, 94 Pac. 1056.)

Messrs. Barker & Cromer, for Respondent, submitted a brief; *Mr. H. L. De Kalb*, of Counsel, argued the cause orally.

Respondent concedes that the proper procedure, where a plaintiff has failed to file a reply to an affirmative answer, is a motion for judgment on the pleadings, and respondent does not rely on the default entered against the appellant, but does rely upon his motion for judgment on the pleadings. The fact that the default was filed and entered does not deprive respondent of his rights under his motion for judgment on the pleadings. (*Anaconda Copper Min. Co. v. Thomas*, 48 Mont. 222, 137 Pac. 380.)

Applying the provisions of sections 6560 and 6562, Revised Codes, to the facts in this case, we have the result that, as the appellant did not file his reply until one year, seven months and twenty days after answer was served and filed, the respondent was entitled to judgment on the pleadings without further proof than the pleadings. (*State v. District Court*, 32

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Mont. 37, 79 Pac. 546; *State v. Quantic*, 37 Mont. 32, 94 Pac. 491; *Anaconda Copper Min. Co. v. Thomas*, 48 Mont. 222, 137 Pac. 380.) A motion for judgment on pleadings is a trial. (*State v. District Court*, 32 Mont. 37, 79 Pac. 546.) It was too late to file the reply after the case was ready for trial.

An examination of the record discloses that the conduct of this case has been characterized by inexcusable carelessness on the part of appellant; or, if not carelessness, it is an admission that the appellant's case is not *bona fide*. The complaint was filed July 11, 1917. On the same day respondent served on appellant and filed a demand for a bill of items of account. No such bill has ever been furnished to respondent. Therefore, even if the default were set aside and a trial ordered, the appellant would not be permitted to submit any evidence in support of his complaint. (*Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427; *Scott v. Frost*, 4 Colo. App. 557, 36 Pac. 910.) In *Martin v. Heinze*, *supra*, the court says: "If the copy is not furnished at all, the penalty may be exacted." The penalty is that the plaintiff is precluded from giving any evidence in support of his complaint. (Sec. 6569, Rev. Codes.)

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal by the plaintiff from a judgment made and entered in favor of the defendant. The complaint was apparently filed on the eleventh day of July, 1917, and it is alleged therein: "That during the year 1914 plaintiff advanced to the defendant, at the special instance and request of the defendant, certain moneys for the purchase of a relinquishment and for the placing of improvements upon the lands, which are now the property of the defendant, in the sum of \$2,000. That the said sum of money was to be repaid to the plaintiff by the defendant at such time as the defendant could make final proof upon his lands." It is further alleged that the defendant had made final proof upon the lands and had not

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repaid the money to the plaintiff, although demand had been made therefor. The defendant in his answer denied the allegations of the complaint, except that he admitted that he borrowed \$75 from the plaintiff, and that he executed and delivered to plaintiff a promissory note therefor; that he had made final proof upon the lands; that he refused to pay the plaintiff the sum of \$2,000 or any part thereof. Further answering the complaint, by way of counterclaim, defendant alleged that he performed certain labor and services for the plaintiff, at his special instance and request, between and during the months of March and July, 1914, and that the plaintiff expressly promised to pay to the defendant the sum of \$40 a month, amounting to the sum of \$180; that plaintiff had not paid the same to defendant, and judgment is demanded therefor, together with interest thereon. This answer was filed August 22, 1917. On the day the complaint was filed the defendant appeared and filed a general demurrer and also served and filed a demand upon plaintiff that he furnish to the defendant, within five days, a bill of particulars of the amounts of money alleged to have been advanced by plaintiff to defendant and the time when each item of money was so advanced. On January 10, 1918, the defendant caused to be entered the default of the plaintiff for failure to reply to the counterclaim. On April 10, 1919, the plaintiff served and filed his reply to the defendant's counterclaim, and on the 14th of April moved the court to set aside the default and to permit plaintiff to file his reply and filed an affidavit in support of his motion.

Appellant maintains that a default may not be entered for [1] failure of the plaintiff to reply to a counterclaim pleaded by defendant, but that right is given by statute, and the practice has been sanctioned by this court. (Secs. 6560, 6562, 6515, Rev. Codes; *State v. Quantic*, 37 Mont. 32, 94 Pac. 491; *Anaconda Copper Min. Co. v. Thomas*, 48 Mont. 222, 137 Pac. 380.)

Appellant further maintains that a default cannot be taken [2] when a reply or answer is on file. It is true that a de-

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fault cannot be entered when there is a reply properly on file, controverting defendant's counterclaim (*Sell v. Sell*, 58 Mont. 329, 193 Pac. 561), but it is also true that a party cannot escape the consequences of his neglect by filing a plea after the expiration of the time and after default entered (23 Cyc. 745). At the time the default was entered for failure of the plaintiff to reply to defendant's counterclaim, there was no reply on file, and the reply was not filed for nineteen months after the twenty days had expired, and more than fourteen months after the default had been entered. Four days after the plaintiff filed his reply, and on April 14, 1919, he moved the court to set aside the default and to permit a reply to be filed. This motion was never disposed of except by ordering judgment for defendant. If the reply filed was in fact only a reply tendered with the motion, it fell with the denial of the motion. Regarding the reply in any other light than as a part of the motion, it was not properly filed. The statute requires a reply to be filed within twenty days and authorizes a default to be entered if it is not filed in that time. (Secs. 6560, 6562, 6515, Rev. Codes.)

The court of appeals of Maryland held, under a similar statute, that pleas filed under circumstances here stated should be disregarded as mere nullities because they were filed in violation of the terms of the statute. In discussing the question, the court said: "This is the clear meaning of the terms of the statute, and if by construction a different meaning be attributed to them, such as that contended for by the defendant, they would be virtually deprived of all restrictive force, and the defendant, in any case, would be able to do what was attempted to be done in this case; that is, to defeat the plaintiff's right to judgment by simply placing upon record pleas and affidavits at any time before judgment entered, regardless of the fact that no cause had been shown nor any leave of the court obtained. To suffer this to be done would simply be in defiance of the express terms of the statute." (*Gemmell v. Davis*,

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71 Md. 458, 18 Atl. 955.) This decision was reaffirmed in the later case of *John W. Waldeck Co. v. Emmart*, 127 Md. 470, 96 Atl. 634.

Other courts, either directly or impliedly, have given the same construction to similar statutes.' (*Irvine v. Davy*, 88 Cal. 495, 26 Pac. 506; *Camp v. Phillips*, 88 Ga. 415, 14 S. E. 580; *Harrison v. Kramer*, 3 Iowa, 543; *Luke v. Johnnycake*, 9 Kan. 511.)

It was not error for the court wholly to disregard this so-called reply in considering the motion for judgment on the counterclaim. Had the reply been filed prior to the entry of default, a different question would be presented.

The cause, as made by the complaint, was set for trial on April 14, 1919, the plaintiff's counsel was then present. The case was continued for trial until April 15, 1919, at 9:30 o'clock A. M. At that hour, on April 15, the case was called for trial, and defendant appeared in person and by counsel. There was no appearance on the part of the plaintiff, and the default of the plaintiff for failure to appear for trial was entered and defendant ordered to proceed with proof on his counterclaim. Defendant was then sworn and testified, and the court directed judgment to be entered against the plaintiff. Subsequently, at 10 o'clock A. M. on that day, the plaintiff's counsel appeared in open court and orally moved to set aside the default of the plaintiff. The court refused to entertain an oral motion for setting aside the default, and it was ordered that entry of judgment be stayed until April 16, 1919, at 10 o'clock A. M., and that counsel for plaintiff be given until that time to prepare, serve and file his motion to set aside the default of the plaintiff for failure to appear at the trial. The plaintiff's motion was served and filed, supported by the affidavit of his attorney, at the time named. "In legal effect, the [3] order [entering default of plaintiff for failure to appear at the trial] amounted to nothing more than a declaration that the plaintiff had failed to be personally present at the

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time of trial, and in that sense the term 'default' is not infrequently used." (*Sell v. Sell*, 58 Mont. 329, 193 Pac. 561.)

The court directed judgment to be entered in favor of the defendant. The affidavit of plaintiff's attorney is to the effect that he was not advised of the fact that the cause had been continued until 9:30 A. M. on April 15, but supposed the same would come up regularly at the hour of 10 o'clock A. M., when under the rules court convened, unless a different hour was named, and also that he had been advised by the judge that the cause would be heard at 10 o'clock; that, relying upon this information, he was not present until the hour of 10 o'clock, and the default had already been entered. The affidavit of defendant's attorney, however, is to the effect that the cause was originally set for April 14 at 10 o'clock in the morning, and was then continued until 3:30 P. M. of that day; that at the latter hour it was again by order of the court continued until April 15 at 9:30 A. M., and that the plaintiff and his counsel were both present in court at the time this order was made. It is admitted that the plaintiff was present on the fourteenth day of April when the cause was set for trial, and knew that an order had been made continuing it until the next morning. It was certainly incumbent upon him to keep himself informed as to what particular time the cause was continued for trial. The affidavits of the attorneys filed are [4] hopelessly in conflict, but the minutes of the court are to the effect that the plaintiff's attorney was notified of the setting of the case at the hour of 9:30 A. M. of April 15. These minutes are a part of the court record and import verity. The evidence regarding the correctness of this entry by the clerk is in conflict. The presumption is that the entry made by the clerk is correct, and this presumption is not overcome by the affidavits filed.

Furthermore, it does not appear from the record that the [5] plaintiff made any response whatsoever to the defendant's demand for a bill of particulars. On the face of the complaint

it appears that this is a case where a bill of particulars may properly be demanded. Hence, had this default not been taken at all, the plaintiff could not, as a matter of right, have demanded to be heard at the trial. (Sec. 6569, Rev. Codes; *Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427; *Scott v. Frost*, 4 Colo. App. 557, 36 Pac. 910.)

We find no reversible error in this cause, and recommend that the judgment appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

Affirmed.

RYAN, RESPONDENT, v. DISTRICT No. 1 OF POWELL
COUNTY, APPELLANT.

(No. 4,453.)

(Submitted September 20, 1921. Decided October 10, 1921.)

[201 Pac. 283.]

*Schools—Teacher's Contract — Breach — Findings—Conflicting
Evidence—Appeal and Error.*

1. In an action for breach of a school-teacher's contract, the only issue in which was whether plaintiff had voluntarily resigned or was discharged in violation of its terms, tried by the court, the evidence, conflicting in nature, held sufficiently substantial to support the finding in plaintiff's favor.

Appeals from District Court, Powell County; George B. Winston, Judge.

ACTION by Mary B. Ryan against School District No. 1 of Powell County. Judgment for plaintiff and defendant appeals from it and from an order denying a new trial. Affirmed.

Mr. W. E. Keeley, for Appellant, submitted a brief.

Where a regularly qualified school-teacher has been employed under a contract entered into with the board of trustees to teach school for a specified number of months, it is not in the power of such board to dismiss him, and if such board dismisses such teacher, it exceeds the limits of its statutory authority, and its act in doing so binds no one. It is *ultra vires*. If the trustees by the employment of others prevent such teacher from complying with his contract, then the trustees, and not the district, are liable to him for resulting damages. If such teacher fails to continue to teach after an unlawful dismissal, his discontinuing to teach is, in legal effect, a voluntary abandonment and therefore the school district is not liable. (*Oakes v. Simrell*, 98 Mo. App. 163, 71 S. W. 1060.) And where a school board acts beyond the scope of its authority, and forcefully prevents a school-teacher from complying with his contract, the members of the board, and not the district, are liable to the teacher therefor. (35 Cyc. 1096; *Wiest v. School District*, 68 Or. 474, 49 L. R. A. (n. s.) 1026, 137 Pac. 749; *Rock Island Lumber & Mfg. Co. v. Elliott*, 59 Kan. 42, 51 Pac. 894.) Indeed, this court has directly passed upon this very question, holding that the acts of the school clerk, beyond statutory authority, do not bind the district. (*Kenyon-Noble Lumber Co. v. School District*, 40 Mont. 123, 129, 105 Pac. 551.)

Mr. S. P. Wilson, for Respondent, submitted a brief, and argued the cause orally.

Except for the proposition that school districts are not liable upon contracts in cases such as this, appellant's brief is devoted entirely to the argument that the decision of the court below is against the weight of evidence, upon the affirmative defenses of (a) abandonment by plaintiff of her contract, and (b) rescission of the contract by an accepted resignation. It cannot

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be honestly claimed from the testimony that there is not substantial testimony to sustain the decision. Whether or not the evidence preponderates against the decision is unimportant. The action is a common-law action triable by a jury. A jury having been waived, the rule that the decision of the trial court will not be disturbed if sustained by substantial testimony applies the same as if the decision had been arrived at by the jury. (*Brown v. Threlkeld's Guardian*, 154 Ky. 833, 159 S. W. 595.) That school districts are liable upon contracts such as this is so universally sustained by the authorities that it can scarcely be the subject of argument. (*Kellison v. School Dist. No. 1*, 20 Mont. 153, 50 Pac. 421; *Curttright v. Independent School Dist. of Center Junction*, 111 Iowa, 20, 82 N. W. 444; *Watkins v. Special School District of Lepanto* (Ark.), 194 S. W. 32; 35 Cyc. 1095, 1097, and cases cited.)

MR. COMMISSIONER SPENCER prepared the opinion for the court.

On March 3, 1919, plaintiff obtained judgment against the defendant for \$400, together with interest thereon from June 1, 1918, and \$11.70 costs. Defendant's motion for a new trial was denied, and appeal is from the order denying the motion and from the judgment.

The complaint alleges, in substance, the execution of a writ-
[1] ten contract on June 14, 1917, by plaintiff and defendant, whereby the plaintiff agreed to teach school in district No. 1 of Powell county for a period of nine and three-fourths months beginning September 3, 1917, for a stipulated wage of \$780, or \$80 per month; that plaintiff entered upon her employment in accordance with the contract, and discharged all the duties required of her until February 12, 1918, when defendant discharged her, and refused to permit her longer to continue her employment under the contract; that she fulfilled all the terms of the contract required of her, and complied in all respects with the laws of the state and rules of the school

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board, and that her discharge by the defendant was arbitrary, wrongful, unlawful and without cause; and that plaintiff in no wise acquiesced in the discharge, and that at all times during the period of said contract she held herself in readiness to perform. The complaint then alleges \$400 as the amount due under the contract, demand, and refusal of payment.

The answer admits the execution and acceptance of the contract by both plaintiff and defendant and the performance of its terms by plaintiff until February 11, 1918, and denies all other allegations. For affirmative defenses the defendant urges abandonment of the contract by plaintiff's resignation, and rescission by mutual agreement of the parties and settlement of the claim sued upon by tender of warrant for \$84 by defendant, and acceptance thereof by the plaintiff, all of which affirmative defenses were put in issue by reply.

A jury was expressly waived by both parties, and trial had to the court. The proceedings at the trial disclose that the only issue to be determined was whether the plaintiff voluntarily resigned and abandoned her contract, or was discharged in violation of its terms. The court resolved all doubt in favor of the plaintiff and ordered judgment accordingly. The evidence offered by the respective parties is not harmonious, nor from the standpoint of either is it entirely satisfactory. In general, it presents a conflict. The court, exercising its functions as both court and jury, found the facts in favor of the plaintiff. We think there is substantial evidence to support the finding, and hence it is not for this court to substitute its judgment for that of the court which tried the case.

We find no merit in any of the assignments of error, and therefore recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

Affirmed.

STATE EX REL. GREEN, RESPONDENT, v. WRIGHT, APPELLANT.

(No. 4,463.)

(Submitted September 21, 1921. Decided October 10, 1921.)

[201 Pac. 316.]

Intoxicating Liquors—Wrongful Seizure—Void Search-warrant—New Trial Unauthorized.

Intoxicating Liquors—Wrongful Seizure—Void Search-warrant—Return of Liquors.

1. Judgment declaring a quantity of whiskey seized under a void search-warrant forfeited and ordering it destroyed, reversed upon authority of *Samlin v. District Court*, 59 Mont. 600, 198 Pac. 362, with directions to the trial court to dismiss the proceeding instituted under the Prohibition Enforcement Act (Chap. 143, Laws 1917), and order the sheriff to return to the claimant the articles seized.

Same—New Trial—Motion Unauthorized.

2. In a search-warrant proceeding instituted under the provisions of the Prohibition Enforcement Act, a motion for a new trial is unauthorized.

Appeals from District Court, Missoula County; R. Lee McCulloch, Judge.

SEARCH-WARRANT proceeding instituted by the state on the relation of J. T. Green against M. F. Wright. Judgment for plaintiff. Defendant appeals from the judgment on an order denying him a new trial. Appeal from order dismissed. Judgment reversed.

Mr. Harry H. Parsons and *Mr. Thomas N. Marlowe*, for Appellants, submitted a brief; *Mr. Marlowe* argued the cause orally.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody* and *Mr. Carl E. Cameron*, Assistant Attorneys General, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, argued the cause orally.

Opinion: PER CURIAM.

This case is a search-warrant preceeding, instituted in the [1] district court of Missoula county under the provisions of the Prohibition Enforcement Act (Laws 1917, Chap. 143). It came before this court on appeal by defendant and claimant from the final judgment rendered by the court after a hearing upon the return by the sheriff of the warrant declaring forfeited a quantity of whiskey seized thereunder and ordering it destroyed, and an attempted appeal from an order denying a motion for a new trial.

The appeal from the order denying the motion is dismissed, [2] for the reason that a motion for a new trial in such proceedings is not authorized. The appeal from the judgment presents the same question as that presented in the cases of *State ex rel. Samlin v. District Court of Custer County*, 59 Mont. 600, 198 Pac. 362, and *State ex rel. Hogue v. O'Brien*, 60 Mont. 178, 198 Pac. 1117. Upon the authority of these cases, the judgment is reversed, and the district court is directed to dismiss the proceeding and order the sheriff to return the whiskey and articles seized to the defendant and claimant.

Reversed.

STATE EX REL. GOODWIN, RESPONDENT, v. DISHMON ET
AL., APPELLANTS.

(No. 4,498.)

(Submitted September 26, 1921. Decided October 10, 1921.)

[201 Pac. 286.]

(For syllabus, see *State ex rel. Green v. Wright, ante*, p. 113.)

Appeals from District Court of Missoula County; R. Lee McCulloch, Judge.

PROCEEDING instituted by the State on the relation of Leonard Goodwin under the Prohibition Enforcement Act. Judgment for plaintiff. Claimants and defendants Ora Dishmon and another appeal from the judgment and from an order denying them a new trial. Appeal from order dismissed, and judgment reversed.

Mr. Harry H. Parsons, for Appellants, submitted a brief and argued the cause orally.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, submitted a brief; *Mr. Foot* argued the cause orally.

Opinion: PER CURIAM.

This case is a search-warrant proceeding, instituted in the district court of Missoula county under the provisions of the Prohibition Enforcement Act (Laws 1917, Chap. 143). It came before this court on appeal by defendants and claimants from the final judgment rendered by the court, after a hearing upon the return by the sheriff of the warrant declaring forfeited a quantity of whiskey seized thereunder and ordering it destroyed, and an attempted appeal from an order denying a motion for a new trial.

The appeal from the order denying the motion is dismissed, for the reason that a motion for a new trial in such proceeding is not authorized. The appeal from the judgment presents the same question as that presented in the cases of *State ex rel. Samlin v. District Court of Custer County et al.*, 59 Mont. 600, 198 Pac. 362, and *State ex rel. Hogue v. O'Brien*, 60 Mont. 178, 198 Pac. 1117. Upon the authority of these cases, the judgment is reversed, and the district court is directed to dismiss the proceeding, and order the sheriff to return the whiskey and articles seized to the defendants and claimants.

Reversed.

CAMERON, APPELLANT, v. JUDITH MERCANTILE &
CATTLE CO., RESPONDENT.

(No. 4,469.)

(Submitted September 21, 1921. Decided October 17, 1921.)

[201 Pac. 575.]

*Personal Injuries—Master and Servant—Assumption of Risk
—Safe Place to Work—Nonsuit.*

Personal Injuries — Master and Servant — Assumption of Risk — Defense Lies, When.

1. The defense of assumption of risk is available to an employer, where, though plaintiff's injury resulted from a hazard brought about by the failure of defendant to discharge his primary duty to provide

1. On assumption of obvious risks of hazardous employment, see note in 1 L. B. A. (n. s.) 272.

On servant's knowledge as element of defense of contributory negligence in entering or remaining in employment, see note in 49 L. B. A. 33.

The question, May servant assume risk of dangers created by the master's negligence? is discussed in notes in 4 L. B. A. (n. s.) 848; 28 L. B. A. (n. s.) 1215, 1250.

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a reasonably safe place in which or reasonably safe appliances with which to work, plaintiff was aware of the thus increased hazard, or the hazard was so obvious that an ordinarily prudent man placed in the same circumstances would have known and appreciated it, but continued in the employment without complaint or protest.

Same—To Farm Laborer—Unguarded Circular Saw—Safe Place to Work—Assumption of Risk—When Nonsuit Proper.

2. *Held*, under the above rule, that where plaintiff, a farm-hand aged twenty-six years, who had been directed by the foreman to assist his coemployees in cutting stovewood with a circular saw which was located in the open the same as it had been during the three years of his employment and was unprovided with a guard, and with the operation of which he was thoroughly familiar, voluntarily assumed to act as sawyer and in its operation slipped on icy ground covered with newly fallen snow and was injured by coming in contact with the revolving saw, he assumed the risk and judgment of nonsuit was proper.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

ACTION by E. J. Cameron against the Judith Mercantile & Cattle Company, a corporation. Judgment of nonsuit and plaintiff appeals. Affirmed.

Messrs. Cheadle & Cheadle, for Appellant, submitted a brief; *Mr. E. K. Cheadle* argued the cause orally.

Messrs. Belden & De Kalb and *Mr. Merle C. Groene*, for Respondent, submitted a brief; *Mr. O. W. Belden* argued the cause orally.

Citing: *Kean v. Detroit C. & B. Rolling Mills*, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; 18 R. C. L., p. 685; *Peterson v. American Ice Co.*, 83 N. J. L. 579; 47 L. R. A. (n. s.) 144, 83 Atl. 872; *Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904; *Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884; *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac. 809; *Barry v. Badger*, 54 Mont. 224-229, 169 Pac. 34; *Rogers v. Roe & Conover*, 74 N. J. L. 615,

2. Liability of master for injuries to servant by saw operated by machinery, see note in *Ann. Cas.* 1913C, 125.

13 L. R. A. (n. s.) 691, 66 Atl. 408; *Arizona Lumber etc. Co. v. Mooney*, 4 Ariz. 366, 42 Pac. 952.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff brought this action to recover damages for an injury to his right forearm through the alleged negligence of the defendant. At the trial the court sustained defendant's motion for nonsuit. Judgment was entered accordingly. Plaintiff has appealed.

On December 12, 1917, plaintiff and four or five others, employees of the defendant, were by direction of John Hughes, defendant's manager and foreman, engaged in sawing its yearly supply of stovewood. They were using a circular saw, mounted on a frame and propelled by a gasoline engine. The foreman was not present at the time, and had given these employees general directions to saw up a pile of wood which had been hauled in, consisting of sticks of different sizes and lengths, varying from five to fourteen inches in diameter and from five to twenty feet in length. In giving his directions, the foreman did not assign to each of the employees his particular part of the work. When work began, the plaintiff chose to perform the duty of sawyer. The sticks were passed from left to right by the others, who placed them upon a swinging table or carrier attached to the saw frame, and assisted the plaintiff to pass them along the carrier and to hold them in place while he moved them against the saw. The sticks were cut into fourteen inch blocks, one of the other employees carrying them away as they were cut off. The saw was about thirty inches in diameter. Some of the sticks were so large that it would not cut them entirely through, and it was necessary to turn them over and saw them on the other side. The saw and engine stood in the yard, and were not under shelter of any kind to protect

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them from snow or rain. Some time before the day of the accident snow had fallen; it had partly melted and again frozen. During the previous night other snow had fallen so that the ground where it was necessary for plaintiff to stand while operating the saw, was covered with snow, partly that which was frozen and partly that which had fallen on the previous night. While he and his associates were engaged in placing a large stick—about fourteen inches in diameter—on the saw frame and moving it to the right far enough to allow the proper length to be cut, the plaintiff's feet slipped, and, in an effort to save himself from falling, he struck his right forearm against the saw, which cut and lacerated the muscles and tendons near the wrist. The saw frame was not fitted with any guard or safety appliance to prevent the sawyer from accidentally coming in contact with the saw.

The complaint alleges that the defendant was negligent in not having the saw frame equipped with a guard or other safety appliance, in not providing a shelter to protect it and the ground from snow and ice, and in requiring plaintiff to cut sticks of the length and size of those he was required to cut, in that the saw was designed only for the cutting of cordwood, and in that, though it knew, or in the exercise of ordinary care and diligence should have known, of all these conditions, the plaintiff did not know and had no means of knowing the danger to which he was exposed.

One of the grounds for nonsuit was that the evidence introduced by the plaintiff disclosed, as a matter of law, that he assumed the risk of the danger incident to the work in hand. Whether he did or not is the only question submitted for decision.

The rule is well established in this jurisdiction that the defense of assumption of risk may be interposed by the employer as a bar to an action for a personal injury to, or the death of, an employee caused by a hazard which is in-

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cident to the particular employment. It presupposes primarily that the employer has discharged his full duty to exercise ordinary diligence to provide a reasonably safe place for the work, reasonably safe and suitable appliances, and a sufficient number of reasonably competent fellow-employees to enable him to perform his work with reasonable safety. The rule is also well established that the defense is available when the injury has resulted from a hazard brought about by the failure of the employer to discharge his primary duty in any of the particulars referred to above, provided the employee is aware of the increased hazard, or it is so obvious that an ordinarily prudent person, placed in the same circumstances, should have known and appreciated it and yet continues in the employment without complaining or protesting. (*Sorenson v. Northern Pac. Ry. Co.*, 53 Mont. 268, 163 Pac. 560, and cases cited.) For a somewhat extended discussion of all the phases of this subject, reference is made to the case of *Choc-taw etc. R. Co. v. Jones*, 77 Ark. 367, 7 Ann. Cas. 430, 4 L. R. A. (n. s.) 837, 92 S. W. 244, and notes to this case in 7 Ann. Cas. 430.

The plaintiff was the only witness who testified to the circumstances surrounding the accident. He was then about twenty-six years of age and had been employed in doing farm work for about thirteen years. For the three years preceding the accident he had been in the employment of the defendant, and was familiar with the different kinds of work persons so employed are required to do. It was customary for those employed on farms in this community to saw the yearly supply of wood during the winter. The saw and engine were in the yard near the farmhouse and had been there in the same position throughout the three years of plaintiff's employment where everyone could see them. Theretofore plaintiff had assisted in using them to saw wood. On these occasions he had not acted in the capacity of

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sawyer, but had assisted in bringing up the wood and placing it on the carrier, the other employees alternately acting as sawyers. He was familiar with the machinery, however, and understood its operation. He was not directed by the manager to act as sawyer, but voluntarily chose to act in that capacity. The pile of wood was lying near by. Whether he took part in cutting and hauling it, the evidence does not show. He began work knowing what was required of him. He knew that the saw was not guarded. He knew of the depth of the snow and the condition of the ground where he was obliged to stand. He had observed two other machines which were in use on neighboring farms which were equipped with guards, and knew the purpose of this equipment. There is no suggestion in his testimony that he did not understand and fully appreciate the dangers incident to the work.

The undisputed evidence does not furnish the basis for any other conclusion than that the plaintiff assumed the risk. Independent of a statutory requirement, it is not negligence *per se* for an employer to leave his machinery uncovered or otherwise unguarded. Whether this constitutes negligence depends upon the circumstances of each particular case, the nature of the work, the degree of exposure, and the knowledge which it appears the employee had of the existing conditions. (26 Cyc. 1133, 1134.) Being a mature man and having had ample opportunity to observe, the plaintiff knew that the danger was greater than it would have been if the machine had been provided with a guard. He knew that snow and ice were on the ground, and, having lived in Montana where there is much snowfall, he is presumed to have known that his footing was rendered less secure by it. The pile of wood was in plain view when he went to work, and if, in fact, the machine was not adapted to the sawing of sticks of the size he was required to saw, he had ample opportunity

to know what additional risk there was in sawing it. Under these circumstances, with full knowledge of the increased hazard, he voluntarily entered upon the work, assuming the most hazardous part of the employment, and thus the increased risk.

The judgment is affirmed.

Affirmed.

ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

ROBINSON, RESPONDENT, v. GORDON, APPELLANT.

(No. 4,473.)

(Submitted September 22, 1921. Decided October 17, 1921.)

[201 Pac. 573.]

Malicious Prosecution—Dismissal of Criminal Charge—Judgment—Pleading—Sufficiency—Want of Probable Cause—Improper Instruction.

Malicious Prosecution—Dismissal of Criminal Charge—Judgment—Pleading—Sufficiency.

1. Allegation of the complaint in an action for malicious prosecution for grand larceny in a justice's court, to the effect that the justice dismissed the charge "in due manner, in due course of law," held sufficient to show determination of the prosecution in plaintiff's favor, and not open to the objection that it was fatally defective because not in conformity with section 6571, Revised Codes, providing that where a judgment or other determination of a court is pleaded it may be stated as having been "duly given or made," the statute applying only where the pleader chooses to allege the jurisdiction of the court in the abbreviated form in a cause where the right of action depends upon the validity of the judgment or order pleaded.

Same—Want of Probable Cause—Improper Instruction.

2. Refusal of an offered instruction that if plaintiff in an action for malicious prosecution was guilty of an offense different from the one charged against him, which was dismissed, his discharge will not show want of probable cause necessary to sustain his action, was proper as being too broad.

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Appeals from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by E. S. Robinson against Mike Gordon. From a judgment for plaintiff and from an order overruling his motion for new trial, defendant appeals. Affirmed.

Mr. William Meyer submitted a brief in behalf of Appellant; *Mr. Harry Meyer* argued the cause orally.

Mr. A. B. Melzner and *Mr. Ed. Fitzpatrick* submitted a brief of Respondent; *Mr. Fitzpatrick* argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Action was brought to recover damages for alleged malicious prosecution. Verdict was rendered in favor of plaintiff, and judgment entered in accordance therewith. A motion for new trial was overruled. Defendant has appealed from the judgment and from the order overruling the motion.

Several assignments of error are made, but appellant has [1] expressly waived all but two of them. One of these assignments is that the complaint fails to state facts sufficient to constitute a cause of action. The alleged defect in the complaint is the insufficiency of the statement as to the order of the justice court dismissing plaintiff on preliminary examination on a charge of grand larceny that had been lodged against him by defendant. The allegation of the complaint in this respect is as follows: "The said justice of the peace, in due manner, in due course of law, made an order dismissing the complaint and releasing said plaintiff from further prosecution under said complaint."

Defendant urges that this allegation is insufficient for the reason that it is not alleged *in haec verba* that the order of

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the justice of the peace was "duly given or made." This contention is based upon section 6571 of the Revised Codes, which reads as follows: "In pleading a judgment, or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made."

Defendant cites the following four cases heretofore decided by this court in support of his argument as to the proper interpretation of this statute: *Harmon v. Comstock H. & C. Co.*, 9 Mont. 243, 23 Pac. 470; *Weaver v. English*, 11 Mont. 84, 27 Pac. 396; *Walter v. Mitchell*, 25 Mont. 385, 65 Pac. 6; *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1045.

It is to be noted that in each of these cases the judgment pleaded was the basis of the right upon which the action was founded. In *Harmon v. Comstock*, *supra*, plaintiff's right of action depended upon the validity of an attachment, and of course the validity of the attachment depended upon the jurisdiction of the court. In *Weaver v. English*, *supra*, defendant pleaded a judgment as *res adjudicata*; his right depended on the validity of the judgment. The plea was held insufficient because it failed to show the jurisdiction of the court rendering the judgment pleaded, nor was it alleged that the judgment was duly given or made. In *Walter v. Mitchell*, *supra*, the right of action was based upon the obligation of defendant, as contractor in charge of the Insane Asylum at Warm Springs, to receive an insane person upon order of a court; this obligation was dependent upon the validity of the order of commitment. It was held that the pleading failed to establish the jurisdiction of the court or that the order of commitment was duly given or made. In *State v. Lagoni*, *supra*, the right of action depended upon the validity of a bail bond given upon the order of a justice of the peace to assure the appearance of defendant

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who had been released from custody. If the order was without jurisdiction, the bond was *nudum pactum*, and therefore not enforceable. It was held that the pleading was insufficient because it neither showed jurisdiction of the court requiring the bond, nor that the order requiring the bond was duly given or made.

Prior to the enactment of this statute it was necessary, in all cases where the right of action depended upon the validity of a judgment, to allege facts showing that the court rendering the judgment had jurisdiction so to do. The statute was evidently enacted to simplify the pleading of a judgment or order, and provide that such judgment or order may be stated to have been duly given or made as being sufficient to establish the jurisdiction of the court and validity of the judgment or determination. "Of course, stating that an order was 'duly given or made' is no more than the statement of a conclusion of law, but it is made sufficient by statute, and is for the purpose of obviating the necessity of pleading the jurisdictional facts as the common law requires." (*State v. Lagoni, supra.*)

From the foregoing it is clear that in pleading a judgment or determination of the court upon which a right is founded, it is necessary that the jurisdiction of the court be set forth, or that it be alleged that the judgment or determination was duly given or made or that equivalent words be used. In this case we do not deem it necessary to decide whether or not the words used in the complaint are equivalent to the words set forth in the statute for the reason that in this case the right of action does not depend upon the jurisdiction of the court and the validity of the order dismissing the charges against defendant and releasing him from further prosecution. In a case of this kind the importance of pleading the action of the court in dismissing the charges and releasing the defendant rests in the fact that it must appear that the proceedings which were commenced against the

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plaintiff terminated favorably to him. Plaintiff is not predicated his action upon the validity of the order in question, but upon the fact that the action was brought against him maliciously, without probable cause, and was terminated in his favor. This view of the case is sustained by the decision of this court in *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189. In that case one of the three causes of action was for malicious prosecution. The allegation was that "Stephens was, by an order of the district court, discharged from custody and from prosecution on said charge." This was held to be sufficient because it disclosed the fact that the proceedings had terminated favorably to Stephens. In this case the complaint clearly shows such favorable termination of the proceedings against plaintiff, and is therefore sufficient in this regard.

The other assignment of error relied upon is the refusal [2] of the court to give to the jury defendant's offered instruction, reading as follows: "The discharge of one accused of crime because he was not guilty of the offense charged will not, if he was actually guilty of an offense different from that under which the prosecution was instituted, and under which he should have been prosecuted, show want of probable cause so as to sustain an action for malicious prosecution."

We think this instruction was too broad. The effect of the instruction would have been to advise the jury that, if it found that plaintiff was actually guilty of any offense regardless of what it was and whether or not it related to the facts involved in the criminal charge preferred against plaintiff by defendant, and regardless of whether or not there was any judicial determination of the matter, then plaintiff's discharge on the accusation of defendant would not show want of probable cause so as to sustain an action for malicious prosecution. Under the statute of this state, on preliminary examination before a justice of the peace,

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the justice, if the evidence warrants it, may hold the accused for trial upon a different charge than that for which complaint was filed. (Sec. 9090, Rev. Codes.) If upon the preliminary hearing the justice of the peace had held plaintiff for trial upon any charge whatever, which at the time of the trial of this action was still pending or upon which plaintiff had been convicted, a different question might be presented to this court, but such was not the case. At the time of trial there was not any judicial determination in force against plaintiff holding him for trial on any criminal charge, nor had he been convicted of any offense. It certainly was not within the province of the jury to indulge in an independent investigation on its own account, in a civil case, to determine whether or not plaintiff perchance was guilty of some offense against the laws of the state or nation different from that involved in the prosecution which had been instituted by defendant. The court was right in refusing to give this offered instruction.

For these reasons the judgment and order overruling the motion for new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICE HOLLOWAY concur.

FALLON, APPELLANT, v. CHICAGO, MILWAUKEE & ST.
PAUL RY. CO., RESPONDENT.

(No. 4,459.)

(Submitted September 21, 1921. Decided October 17, 1921.)

[200 Pac. 453.]

*Personal Injuries—Master and Servant—Employment of
Minors — Complaint — Insufficiency — Amendment—When
Denial Proper—Nonsuit.*

Personal Injuries — Master and Servant — Employment of Minor — Com-
plaint—Insufficiency.

1. The complaint in an action by a minor against a railway com-
pany to recover damages for personal injuries under section 1746,
Revised Codes, making it negligence *per se* for an employer to hire
a child under sixteen years of age, must allege that defendant em-
ployed plaintiff knowing him to have been under that age.

Same—Complaint—Insufficiency—Amendment—Denial, When not Error.

2. Refusal to permit plaintiff to amend his complaint at the close
of his case was not error where the contemplated amendment, if per-
mitted, would not have rendered the pleading sufficient.

Same—Negligence—Complaint—Knowledge of Defect—Insufficiency.

3. Complaint charging negligence on the part of defendant railway
company in permitting an apron iron, with its convex side upward,
to lie between the tracks near its roundhouse and shops where plain-
tiff, a call-boy, stepped upon it in the dark, causing him to fall and
be injured, *held* insufficient for failure to allege when defendant
actually learned, or had opportunity to learn, of its presence at the
place of the accident.

Same—Evidence—Nonsuit—When Proper.

4. Testimony of plaintiff examined and *held* insufficient to make out
a *prima facie* case of negligence.

*Appeal from District Court, Fergus County; Jack Briscoe,
Judge.*

ACTION by Vern E. Fallon by Hugh M. Fallon, guardian,
against the Chicago, Milwaukee & St. Paul Railway Company.
From a judgment sustaining a motion for nonsuit, plaintiff
appeals. Affirmed.

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Messrs. Cheadle & Cheadle, for Appellant, submitted a brief; *Mr. E. K. Cheadle* argued the cause orally.

Mr. Charles J. Marshall and *Messrs. Murphy & Whitlock*, for Respondent, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was brought by Hugh M. Fallon, guardian *ad litem* of Vern E. Fallon, to recover damages for personal injuries received by the latter while acting as a call-boy in the roundhouse and shops of the defendant in the city of Lewistown. The allegations of the complaint are that Vern E. Fallon entered the service of the defendant about fifteen days prior to the date of the accident; that he received his injuries about 11:30 P. M. of July 3, 1920, between tracks Nos. 11 and 12 while on his way to another building where he habitually ate lunch; that the "apron iron" over which he stumbled and fell had been negligently left between the tracks by the defendant and its employees and was "negligently and carelessly allowed to remain in an improper and unusual place, and was in a wet and slippery condition, with the convex side of the apron iron upward, so that the plaintiff stumbled and fell thereover, and was injured by the carelessness and negligence of the defendant and its employees"; that the place where the "apron iron" was at the time of the accident was left in darkness by the negligence and carelessness of the defendant, so that plaintiff could not, and did not, see it until he fell upon and over it and was injured.

The answer puts in issue all the allegations of negligence. After the plaintiff had finished his case, and rested, defendant interposed a motion for a nonsuit upon the ground that the plaintiff had failed to prove negligence as the complaint charged. The motion was sustained, and the judgment appealed from was rendered and entered.

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Appellant charges that in its rulings the court committed [1,2] three errors. The second and third specifications only need be considered on this appeal. The second error is predicated upon the refusal of the trial court to permit the plaintiff to amend his complaint at the close of his case, so as to charge the defendant with negligence as a matter of law, in employing the boy while he was under the age of sixteen years. Section 1746 of the Revised Codes makes it negligence *per se* only when a child under sixteen years of age is *knowingly* employed. This allegation, indispensably necessary to charge a violation of the provisions of the section referred to, is absent from the complaint and was not supplied by the proffered amendment. Under rules of pleadings now too well established to be doubted, the district court was justified in ruling as it did.

The third assignment of error is predicated upon the granting [3] of the nonsuit because the plaintiff had not made out a *prima facie* case of negligence. The averments of the complaint merely charge that the plaintiff stumbled and fell over the apron iron by reason of its position between the two tracks in a dimly lighted portion of the roundhouse, with the convex side up and in a slippery condition. Assuming the averments of the complaint to be true, it is nevertheless defective in failing to set forth the time the defendant actually learned of its presence there or had an opportunity so to do. (*Boyle v. Chicago, M. & St. P. Ry. Co.*, 60 Mont. 453, 199 Pac. 283; *Martin v. Northern Pac. Ry. Co.*, 51 Mont. 31, 149 Pac. 89.)

Whether the order granting the nonsuit can be upheld will [4] be settled by a reading of the following epitome of the plaintiff's evidence: Vern E. Fallon's duties were to call the engine crews, machinists, helpers, and others to their work under the direction of the night hostler. At about 11:30 in the evening of July 3, 1916, as he turned to go through a door leading from the roundhouse to the boiler-room to eat lunch, he stumbled and fell upon an apron iron lying between

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two tracks nearest the door and distant a little more than the width of one set of tracks. The engine pit into which he fell was thirty-two inches deep, as wide as the space between the rails, and lined with concrete. He slipped before he stepped upon the apron, his momentum carrying him against the opposite rail and into the pit. There was an engine over the pit next to the one into which he fell, deflecting the light so that it did not show directly on to the apron iron. His account is as follows: "Letcher Gibbs was a boy that was with me that evening. He and I had been together before I started to the boiler-room, and he went back to get his coat and my light that I had left behind me. While he was gone the accident occurred. He was going to the boiler-room with me. * * * I frequently passed through the roundhouse during the fifteen days I had been working there, and had never seen any apron iron lying between the tracks; it was about six feet long, and convex, twenty inches wide, and had little knobs punched up through it, so that the firemen's feet would not slip when they walked across it. I judge it was within six inches of the edge of the pit and parallel with the rails. The convex surface was slippery. There was no engine on the first track inside the roundhouse that night. There was either an engine or a snowplow on the second track. The night was dark, cloudy and rainy." On cross-examination he testified: "The office proper was commonly locked. The telephone was in there. The outer office contained some chairs and a stove. I stayed there the greater part of my time. Between the tracks there is a concrete flooring which is a little convex, for the purpose of allowing the water to run off. There is a cement walk along the side of the building. Between each of the tracks there is a convex space up and down, upon which the employees can walk. * * * I have seen the machinists take pieces off from the engines and lay them down beside the engines and work on them. They usually lay

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the things in between the tracks. * * * It is not uncommon to see articles used in connection with the engines lying between the tracks, beside the engines. I was walking fast, not running. * * * It was pretty dark. I don't believe I could have seen the apron iron if I had looked down, unless I had known it was there. * * * I don't know how many lights there are in that roundhouse; the lights between tracks 11 and 12, if there were any, were not lighted. * * * I saw some kind of a washing-machine standing out there in the space between tracks 11 and 12. The rain was blowing through the door. I slipped on the wet pavement, stepped on the apron iron, and fell over into the engine pit. * * * There were several men working in the roundhouse at the time of the accident, but I do not know just where. The men generally used torches in their work, whether all the lights were on or not. There were lights over the walk in front of the engine pits. I started from the office, and walked clear around the employees' walk, and then came down between tracks 11 and 12, and then started across where the accident occurred. I did not follow the extreme outer walk clear around. I did not think the path outside would have been the safest and quickest to follow, because there was a big container out there that held compressed air. If it had not been rainy and muddy, there would have been a safe way outside the roundhouse straight to the boiler-house from the office. There is a walk clear around the north end of the roundhouse, and along the east side of the roundhouse, for the use of its employees passing out of this door to the boiler-house. I was not directed by any person to take any particular route in passing through the roundhouse. I went wherever I wanted to. There was a safe route by passing around outside the building on the cinder path. The only call I remember making that night was for a machinist. I used my bicycle lamp in making it. The walks at the side of the roundhouse were narrower than the space between the

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tracks. I and the men working in the roundhouse used the spaces between the tracks regularly for going back and forth when we had occasion to. I did not ask the company to furnish me with a lantern, because the storekeeper was not at the roundhouse at night, and I had no chance to ask him. I used a torch, which I picked out, for a while, but it got to leaking and was not of any use. Generally the machinist and the boiler-makers had torches or lanterns; the lanterns were not used at the roundhouse. At the time I was injured my duties as a call-boy did not make it necessary that I should be at the place where I was hurt. I was not making a call at that time."

Joseph G. Sams testified that he was night hostler at the roundhouse when the accident happened; that the boy's duties were to call the engine crews, machinists, and anybody that was needed to work at night. The plaintiff had to call extra help, such as the machinists and helpers, and also engineers and firemen. The witness was not in the roundhouse at the time of the accident. There are lights at the end of the roundhouse, which throw a reflection down on the walk. There are side lights along the sides of the roundhouse. They are put there for the purpose of giving light to the mechanics and employees of the defendant. The lights are not sufficient for a mechanic to work on an engine; the mechanics usually placed the parts taken off the engines in the space between the tracks or by the sides of the engines. If it is dark, one is likely to run into any of the parts or appliances that are lying between the tracks, if there are any, and suffer injury. If an apron iron were taken off from an engine, it would probably be left there a length of time, according to what work there was to do on the engine and how long it would take. The parts taken off the engine would be removed when the engine was finished. It was not customary to leave parts on the floor any longer than it took to make repairs on the engine. It was customary for the employees to go between the

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tracks, if they wanted to pass out of this door. The space between track 11 and the outer wall is much narrower than the space between the tracks.

This is substantially all the evidence upon the points necessary to the disposal of this appeal. There is no substantial evidence to sustain the charge that the place at which the accident happened was negligently left in darkness. Nor was there any suggestion in the testimony of the boy that he had no reason to expect to encounter the apron iron as he did. Assuming every fact to be proved that the evidence tends to show, it is not shown that the defendant knew the apron iron was in that particular place, from whence it came, the circumstances under which it came to be there, the length of time it was actually permitted to remain there, nor that it was not there in the course of the ordinary repair operations in the roundhouse.

The judgment is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS and HOLLOWAY concur.

SMALLHORN, APPELLANT, v. FREEMAN, RESPONDENT.

(No. 4,461.)

(Submitted September 21, 1921. Decided October 17, 1921.)

[201 Pac. 567.]

*Default Judgments—Setting Aside—Affidavits—Insufficiency—Real Property—Vendor and Purchaser—Description of Property—Indefiniteness of Complaint—Inferences.***Default Judgments—Setting Aside—Insufficiency of Showing.**

1. Affidavits of counsel for defendant in support of a motion to vacate a default judgment entered some two years and six months after the original complaint was served upon her, stating that defendant resided on a farm in California and that it was impossible to get mail to and from her without considerable loss of time; that because of her age it required much time for her to recall matters connected with the litigation, and that though numerous letters had been written to her, counsel were unable to obtain a complete statement of the case from her until after the time for answering had expired, *held* insufficient to warrant reversal of the order denying the motion nothing appearing that counsel made any effort to ascertain the facts relating to the defense until demurrer to the fourth amended complaint had been overruled, two months before entry of default, and counsel having made no effort to obtain any extension of time within which to file an answer.

Real Property—Vendor and Purchaser—Breach of Contract—Complaint—Description of Property.

2. In an action to recover the purchase price of land, the complaint must so describe the property that the particular tract may be identified.

Pleading—Sufficiency—Inferences—When Rule may be Invoked.

3. Before the rule that whatever is implied in or reasonably to be inferred from allegations of a pleading is to be taken as directly averred may be invoked, it must appear that sufficient facts are stated to furnish a basis for the implication or inference.

Same—Complaint—Definiteness—Special Demurrer.

4. A complaint to be proof against a special demurrer, ought at least to be sufficiently definite and certain to be on its face a bar to another suit on the same cause of action.

Real Property—Title—How Transferred.

5. Generally speaking, the title to real estate may be transferred only by a definite written instrument supported by a lawful consideration.

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Same—Sale—Breach of Contract—Complaint—Indefiniteness.

6. *Held*, under the above rules, that a complaint alleging that plaintiff was the owner of 320 acres of land in B. county, Montana, of the reasonable value of \$3,200, that he sold and conveyed the land to defendant, and that "the said sum has not been paid," was so uncertain as to the description of the property and the consideration for which the transfer was made, as to render it vulnerable to a special demurrer for uncertainty.

Appeals from District Court, Beaverhead County; Jos. C. Smith, Judge.

ACTION by James Smallhorn against Rebecca Freeman. From a default judgment for plaintiff and an order denying a motion to vacate and set aside the default, defendant appeals. Reversed and remanded.

Mr. C. E. Pew and *Messrs. Pease & Stephenson*, for Appellant, submitted a brief, and one in reply to that of Respondent; *Mr. Pew* argued the cause orally.

Under the showing made by appellant, she was entitled, as a matter of right, to relief from default. (*Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181; *Morehouse v. Bynum*, 51 Mont. 289, 293, 152 Pac. 477; *Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693; *Mantle v. Largey*, 17 Mont. 479, 43 Pac. 633; *Morse v. Callantine*, 19 Mont. 87, 47 Pac. 635; *Pengelly v. Peeler*, 39 Mont. 26, 101 Pac. 147; *Voelker v. Golden Curry Consol. Mining Co.*, 40 Mont. 466, 107 Pac. 414.) The neglect of which appellant's attorneys were guilty in this case was much more excusable than that involved in some of the cases above cited, and was no more inexcusable than any shown in these cases.

This court has held that where a default has been entered against a defendant upon a complaint which fails to state facts sufficient to constitute a cause of action, the district court should set aside such default upon that ground. (*Willoburn Ranch Co. v. Yegen*, 45 Mont. 254, 122 Pac. 915; *J. I. Case Threshing M. Co. v. Simpson*, 54 Mont. 316, 170 Pac. 12;

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Young v. Bray, 54 Mont. 415, 417, 170 Pac. 1044.) Aside from this, however, upon appeal from a judgment the sufficiency of the complaint is open to question.

The seventh cause of action is unique. It would be possible under its allegations to prove any kind of a transaction. The words "sold and conveyed" merely indicate the character which respondent sees fit to attach to whatever transaction may have occurred. If this count is good, he could prove that appellant had obtained a conveyance from him by fraud, and that he had elected to call it a sale. He could prove that he conveyed the property to her to be used for a certain purpose, or to be disposed of in a certain way, and that she had violated her agreement, and that he had elected to hold her for the reasonable value as on a sale. Any one of a great variety of transactions which under the law would entitle him to recover the price from her, as for a sale could be shown. Under the holding in *Truro v. Passmore*, 38 Mont. 544, 100 Pac. 966, the pleading is absolutely bad in every respect.

Mr. W. J. Cushing and *Messrs. Norris, Hurd & Collins*, for Respondent, submitted a brief; *Mr. John Collins* argued the cause orally.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

Appeal by defendant from a judgment of default entered against her and from an order made subsequent to judgment.

The original complaint herein was filed on June 9, 1916, and personal service was had upon the defendant at Dillon, Montana, on that day. Subsequently demurrers were filed consecutively to the original complaint and the first, second, and third amended complaints, which demurrers were sustained. A fourth amended complaint was filed, and the

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demurrer thereto was overruled on November 18, 1918, and defendant given until December 18 to answer. This time was by stipulation extended to January 15, 1919. No answer was filed, and on January 16, 1919, the default of the defendant for want of answer was entered. On January 28, 1919, motion was made to set aside the default, which was denied on February 8, 1919, and judgment was entered on February 13. Subsequently motion was made to vacate and set aside the default judgment, and for leave to renew the motion to vacate and set aside the default entered prior to the judgment. This motion was accompanied by affidavits and by a proposed answer. The court denied the motion.

Various reasons are alleged in the affidavit why the de-
[1] fault should be set aside, among them being: "That said defendant is a woman of great age, to-wit: more than seventy years of age, and that said defendant lives in Triunfo, California; that her residence is on a ranch, or farm, lying at some distance from Los Angeles, California, and that it is impossible to get mail to and from her without considerable lapse of time; that because of her age and because of the fact that she is in feeble health, she is and was unable to come to Dillon, Montana, the place where her attorneys reside, for the purpose of furnishing said information; that she could leave California only during the summer season; that all the transactions involved in this action took place many years ago, and that defendant has difficulty in recalling them to mind; that because of her great age she is unable to recall matters with the same distinctness that she formerly could; that it is necessary that she take more time in which to recall to her mind occurrences and transactions involved in this action"; that counsel had written numerous letters to her, but were unable until after the time for answering had expired to "get more than a partial statement of facts in said case." It is further stated in the affidavits that the

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defendant at no time had any intention of abandoning the case, and reference is made to the numerous demurrers that had been filed and the legal questions that had been fought out. It does not, however, appear that the then counsel for the defendant had made any effort to inform themselves of the facts in defendant's defense until after the overruling of the demurrer to the fourth amended complaint. It is true that the record does not disclose any facts tending to show that it was the intention of the defendant to abandon her defense. It is likewise true that there is nothing in the record disclosing any intention on the part of the plaintiff to abandon his case. The counsel for defendant must have known at all times that eventually the defendant would be called upon to meet the facts alleged in the plaintiff's complaint. The fact that the defendant was an old lady residing at a distance would seem to indicate that they should have made some inquiry during the two years and six months and more that intervened between the service of the original complaint upon the defendant at Dillon, Montana, and the time granted defendant to answer the fourth amended complaint on January 15, 1919. It further appears that all of the attorneys then representing the defendant, Mr. Pew not appearing until after the judgment had been entered, and three of the attorneys representing the plaintiff, resided at Dillon, Montana, and that not any effort was made by the counsel for the defense to obtain, either by order or stipulation, any extension of time in which to file an answer. The other reasons assigned by counsel as to why the default should be set aside and as showing inadvertence or excusable neglect have been examined, and we are unable to find that the position of the defendant is sustained by the record, and that therefore the court did not err in refusing to grant the motion to set aside the default, on the ground of inadvertence, mistake, or excusable neglect.

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The fourth amended complaint consists, as therein stated, of seven causes of action. Defendant demurred to each of these causes of action, except the first, both generally and specially. On examination, however, we reach the conclusion that the demurrer was properly overruled as to the first six causes of action. The seventh cause of action alleged in the complaint is as follows: "(1) That at the time hereinafter mentioned the plaintiff was the owner of 320 acres of land in Beaverhead county, Montana, of the reasonable value of \$3,200; (2) that on or about July 1, 1903, at the defendant's request, plaintiff sold and conveyed said lands to the defendant; (3) that the said sum has not been paid, nor any part thereof, although payment has been often demanded by plaintiff." The demurrer to this cause of action is that the same does not state facts sufficient to constitute a cause of action; that it is ambiguous, stating the reasons therefor; that it is uncertain; that it is unintelligible.

It is apparent from the complaint that the only description [2-6] of the land alleged to have been sold to defendant is "320 acres of land in Beaverhead county, Montana." It is maintained by respondent that the answer of defendant tendered cures any defect that may exist in the allegations of the complaint. The answer tendered contains denials, admissions, and allegations respecting each of the several causes of action, and for the most part sets up the affirmative defense of a contract with the plaintiff, entered into since the filing of the complaint respecting the subject matter of this action; but this answer tendered is as general in its allegations respecting a description of the land as is the complaint; that is, it does not describe the land at all, except as to quantity.

If this default judgment is permitted to stand, and plaintiff should bring another action against defendant for the purchase price of a specific tract of land, the record here would

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furnish no defense whatsoever, although the latter tract might in fact be the same, or a part of the same, 320 acres referred to in this complaint. The burden would then be upon the defendant to show affirmatively that the demand then made was for the purchase price of the undescribed 320 acres of land referred to herein. "Under the Code, it is a rule that the allegations of a pleading are to be liberally construed, with the view to substantial justice between the parties. (Section 6566, Rev. Codes.) 'Under favor of this rule, whatever is * * * implied in, or is reasonably to be inferred from, an allegation is to be taken as directly averred.' " (*County of Silver Bow v. Davies*, 40 Mont. 418, 424, 107 Pac. 81, 83.) But there must be sufficient facts stated to furnish a basis for the implication or inference. It is a familiar rule "that in declarations, certainty, at least to a common intent, is necessary."

The statute (sec. 6534, Rev. Codes) authorizes a demurrer to be filed for the reasons stated in the demurrer filed herein. A complaint may be uncertain by reason of its failure to allege matters essential, as well as by the doubtful meaning conveyed by what is alleged. A complaint, to be proof against a special demurrer, ought at least to be sufficiently definite and certain to be on its face a bar to another suit on the same cause of action. The land herein should have been described in some manner so that the particular tract could have been identified. (See opinion of Justice Sharswood in *Hester v. McNeille*, 6 Phila. (Pa.) 263.)

Neither does the complaint allege that the "reasonable value" was the consideration for which transfer was made, nor are there any facts stated or circumstances given from which such fact may be implied, inferred, or presumed. Aside from facts and circumstances that would call into requisition the doctrine of estoppel, the equity power of a court, or in

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cases of fraud or in the settlement of estates or in matters of trust, the title to real estate may be transferred only by a definite written instrument, supported by a lawful consideration. Is a court to presume, imply, or infer, without any statement of facts except the reasonable value of the land at the time of the conveyance, that the owner deliberately executed, acknowledged, and delivered a deed and surrendered possession of his land without some definite understanding as to the consideration he was to receive therefor? May a court of its own motion presume the parties left the consideration to the uncertainty of future ascertainment of value? If the "reasonable value" was the consideration, although undetermined at the time, why not so allege; why leave to conjecture that which may be made certain in a transaction of such importance as the conveyance of real estate?

Conceding that title may be transferred without agreement as to specific consideration, and that the reasonable value of the land might control, yet the fact remains that the parties must have contracted with reference to some consideration, and some fact should be alleged which shows the relation between the purchaser and the consideration for which judgment is demanded against him.

The date of this real estate transaction is stated in the complaint as July 1, 1903, but plaintiff demanded and was granted interest from June 1, 1903. No reason appears why plaintiff was awarded interest for this extra month. This alone, however, if error, would be insufficient to justify a reversal, for the error could be cured.

We believe the special demurrer to the seventh cause of action alleged in the fourth amended complaint should have been sustained. It is assumed by the respondent that the default should be set aside if the respondent has failed to state a cause of action in either of the seven counts set out in his fourth amended complaint. We do not stop to consider

whether this assumption is correctly made. We adopt it as counsel's theory of the case and dispose of it accordingly.

We recommend that the judgment and order appealed from be reversed and the cause remanded for further proceedings.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and the cause remanded for further proceedings.

Reversed.

JOHNSON ET AL., RESPONDENTS, v. LUNDEEN ET AL., DEFENDANTS; BANK OF TWIN BRIDGES, APPELLANT.

(No. 4,470.)

(Submitted September 22, 1921. Decided October 17, 1921.)

[200 Pac. 451.]

Execution — Proceedings Supplemental — Garnishment — Denial of Indebtedness by Garnishee—Procedure.

Execution—Proceedings Supplemental—Power of Court.

1. In proceedings supplemental to execution the only powers possessed by the court are those given it by sections 6853 and 6854, Revised Codes.

Same—Denial of Indebtedness by Garnishee—Procedure.

2. Where, in proceedings supplemental, the garnishee denies any indebtedness to the judgment debtor, the court has no authority to try the question and order payment to be applied to the satisfaction of the judgment, but must either order the judgment creditor to institute an action to determine the fact in dispute or discharge the garnishee.

Appeal from District Court, Musselshell County; George P. Jones, Judge.

ACTION by W. H. Johnson and another, copartners, against A. M. Lundeen and another, in which the Bank of Twin Bridges was served with execution and notice of garnishment, and from an order that it pay over money to be applied to

1. Proceedings supplemental to execution, see note in 100 Am. Dec. 500.

the judgment in the action. The bank appeals. Remanded, with directions to set aside the order.

Mr. Lyman H. Bennett, Mr. J. R. Jones and Mr. V. D. Dusenberry, for Appellant, submitted a brief and one in reply to that of Respondents; *Mr. Jones and Mr. Henry C. Smith*, of Counsel, argued the cause orally.

Under statutes identical to sections 6853 and 6854 of Revised Codes of Montana of 1907, the courts of the various states hold that an order to surrender property in the hands of third parties cannot be legally made except upon admission of garnishee that the property is property of the judgment debtor. (*Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413; *Hartman v. Olvera*, 51 Cal. 501, citing and adopting the New York rule under a similar statute in *Town v. Safe-guard Ins. Co. of New York*, 4 Bosw. (17 N. Y. Super.) 683; *Hagerman v. Tong Lee*, 12 Nev. 331; *Everton v. Parker*, 3 Wash. St. 331, 28 Pac. 536; *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46; *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128; *Wallace etc. Co. v. McLaughlin*, 12 Utah, 411, 43 Pac. 109.) As to disputed ownership or indebtedness, see 17 Cyc. 1442, and footnotes.

Messrs. Maris & Mercer and Messrs. Dillavou & Moore, for Respondent, submitted a brief; *Mr. H. C. Moore* argued the cause orally.

Section 6853, Revised Codes, was quite recently construed in the case of *Knapp v. Andrus*, 56 Mont. 37, 180 Pac. 908. In that case Knapp had secured a judgment against Andrus. An execution was served on the First National Bank of Dillon, appellant, and returned wholly unsatisfied. Proceedings supplementary to execution were instituted, and on the hearing the court made an order directing the bank to pay \$1,500 in satisfaction of the judgment. In its opinion, the court said: "Appellants contend that under section 6854, Revised Codes, the court below was without jurisdiction to make the

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order appealed from. In the view we take of the matter, the order of the court below was justified under section 6853, and section 6854 had no application to the present proceeding.”

It is respondents’ contention that section 6854 has no application. Before it can apply, the evidence given on the hearing must show that the appellant denied the debt, or claimed an interest therein. Sections 6853 and 6854, *supra*, are literally copied from the California statutes, and our legislature in adopting them as the law of this state is presumed to give them the same construction which the courts of California have given them.

The California statutes exactly similar to sections 6853, 6854, *supra*, in regard to the jurisdiction of a court on supplementary proceedings are fully discussed in the case of *Parker v. Page*, 38 Cal. 522, where it is held that the denial of indebtedness must be one of substance and of fact made in good faith. The case has never been overruled, and has been cited with approval in the case in appellants’ brief, to-wit: *Hartman v. Olvera*, 51 Cal. 501, and *Hagerman v. Tong Lee*, 12 Nev. 331. (See, also, *Phillips v. Price*, 153 Cal. 146, 149, 94 Pac. 617; *Finch v. Finch*, 12 Cal. App. 274, 283, 107 Pac. 594, 598, and *Ryland v. Arkansas City Milling Co.*, 19 Okl. 435, 442, 92 Pac. 160.) In the present case, appellant did not file any verified answer denying the indebtedness or claiming an interest therein.

MR. COMMISSIONER SPENCER delivered the opinion of the court.

On June 12, 1919, the plaintiffs caused execution to issue upon a judgment theretofore made and entered in their favor against the defendants. Service of the execution was had upon the Bank of Twin Bridges, together with notice of garnishment, seeking to levy upon moneys supposed to be in the possession of the bank, belonging to defendants. In answer to the garnishment the bank in substance denied being

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indebted to defendants or having in its possession any of their property. Pursuant to the statutes governing proceedings supplementary to execution the bank was thereafter ordered to appear and answer concerning any money or property of the defendants in its possession. It did so appear and answer on July 9, 1919, and through its cashier denied that it was indebted to defendants, or either of them, or that it had in its possession any property belonging to them supplementing its denial with its reasons why it was not indebted or did not have any of their property. Notwithstanding its denial, the court at the conclusion of the evidence made its order that the bank had in its possession \$3,023.97 belonging to and the property of the defendant A. M. Lundeen, and not exempt from execution, and ordered it immediately to deliver that sum to the sheriff of Musselshell county to be applied toward the satisfaction of the judgment in the above-entitled action. The bank has appealed from this order.

The decisions of this court, supplemented by those from other [1, 2] jurisdictions, are conclusive of this appeal. Whenever the provisions of our statutes are invoked in supplemental proceedings in aid of execution the court must look to the statute for whatever power it may desire to exercise. (*In re Downey*, 31 Mont. 441, 78 Pac. 772.) Sections 6853 and 6854, Revised Codes, contain those powers and contain the only powers possessed by the court in proceedings of this nature. If upon examination of the garnishee, debts owing or property is discovered indisputably belonging to the judgment debtor, and not exempt from execution, the court may order the same applied in satisfaction of the judgment (sec. 6853, Rev. Codes; *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46), but where the examination discloses a denial of indebtedness or a disputed ownership in property, the court is powerless to grant any relief other than that authorized by the provisions of section 6854, *supra*. In *Wilson v. Harris*, *supra*, this court has discussed the aims and purposes of

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supplemental proceedings and the power of the court thereunder and in support of that discussion the following from *Everton v. Parker (Powell)*, 3 Wash. 331, 28 Pac. 536, commends itself to our approval, wherein the same procedure under similar statutes as ours was invoked: "When the court finds that the garnishee denies the indebtedness, it is not for it to determine whether or not such denial was made in good faith, or whether it was a good or bad denial, true or false. Some of these elements are frequently involved in denials, and sometimes all of them, but whether or not they are involved are questions to be determined by other tribunals, if in an action for debt, as this was claimed to be, by a jury, after due notice given the defendant to prepare his defense. Section 386 of the Code provides that: 'If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may by an order forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment.' No authority is given here for the court to try any issue of fact. But the respondent disclaims the idea that this proceeding was brought under section 386, but claims that it was brought exclusively under sections 383, 384, and 385. This renders his case still more hopeless; for there is nothing whatever in those sections looking to such an authority on the part of the court. Section 383 simply provides that if it is made to appear by evidence or other proof, to the satisfaction of the judge, that any person or corporation is indebted to a judgment debtor, *etc.*, said judge shall not proceed to determine that question, but 'require such person or corporation to appear at a specified time and place, and answer concerning the same.' The truth spoken of is *ex parte* proof, and is only

proof upon which the order for examination is based. Section 384 indicates the mode of obtaining testimony. It is true that section 385 provides that the judge or referee may order any property of the judgment debtor (with certain exemptions specified) to be applied to the satisfaction of the judgment; but this section should, of course, be construed in connection with section 386. Before the order can be made it must appear either that the garnishee admits the debt, or admits having property of the judgment debtor in his possession, or that one or the other of those facts has been found to exist upon an investigation before a proper tribunal. Any other construction would give a judge an arbitrary power of disposal of other people's property, which would be so plainly unconstitutional that its discussion here would be idle. It seems plain from the statute that there is no middle ground for the court to stand on. If the party admit the debt, or admit the possession of the judgment debtor's property, the court can make the order; but if he deny the debt, the court's duty is equally plain. It can either discharge the garnishee, or authorize the judgment creditor to institute a suit against him, and by order forbid a transfer of the property or other interest until an action can be commenced and prosecuted to judgment, though we do not now decide in what manner the order can be enforced, where it does not appear that the garnishee has specific property of the judgment debtor in his possession." (*Everton v. Parker (Powell)*, 3 Wash. 331, 28 Pac. 536.) To the same effect, see *Thompson etc. Mfg. Co. v. Guenther et al.*, 5 S. D. 504, 59 N. W. 727; *Simpson etc. v. Marshall*, 5 S. D. 528, 59 N. W. 729.

Parker v. Page, 28 Cal. 522, relied upon by the respondents, does not find support in the great weight of authority, nor have the more recent decisions of the California court approved, in its entirety, the rule enunciated in that case. (*Hartman v. Olvera*, 51 Cal. 501; *Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413.) The conclusion reached under the facts peculiar to that case undoubtedly is correct, but we

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condemn it for assuming that the court has authority to determine the vital question of fact—*viz.*, the good faith of the denial of ownership or indebtedness by the garnishee, or, in other words, the question of fraud—which may be tried only in a proper tribunal in an action with proper parties, and is in direct contravention of the constitutional provision that no person shall be deprived of his property without due process of law. (*Everton v. Parker (Powell)*, *supra*.)

The garnishee herein denied any indebtedness to the defendants, and denied having in its possession any property belonging to them, and hence it was idle for the court to pursue its inquiry further, for it thereupon became powerless to determine the *bona fides* of such denial, and could only invoke the provisions of section 6854, Revised Codes, by ordering that an action be instituted to determine the fact in dispute, or discharge the garnishee.

We think the court clearly exceeded its jurisdiction, and that the order complained of is null and void, and hence we recommend that the case be remanded to the district court of Musselshell county, with directions to vacate and set aside the order.

PER CURIAM: For the reasons given in the foregoing opinion, the cause is remanded to the district court of Musselshell county, with directions to vacate and set aside the order.

Remanded.

METTLER, APPELLANT, v. AMES REALTY CO.,
RESPONDENT.

(No. 4,475.)

(Submitted September 22, 1921. Decided October 24, 1921.)

[201 Pac. 702.]

Waters and Water Rights—Riparian Rights—Doctrine of Appropriation — Principles — Injunction — Complaint — Insufficiency.

Waters—Common-law Doctrine of Riparian Rights—Extent of Rights.

1. Under the common-law doctrine of riparian rights, the right to the use and flow of waters of a stream in its accustomed channel is an inherent incident to the ownership of the riparian lands, a right annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land itself, and is not created by use or affected by disuse, and every riparian proprietor upon the same stream has the same right of reasonable use, the rights of each being qualified by the corresponding rights of the others.

Same—Riparian Rights—What Rights Paramount.

2. As between riparian right claimants, the use of water for household and domestic use, drinking and watering livestock, is paramount to artificial uses, irrigation, and other industrial purposes.

Same—"Riparian Proprietor"—Definition.

3. A riparian proprietor is one whose land borders upon a natural stream or through whose land such stream flows.

Same—Riparian Rights—Use of Water.

4. Under the doctrine of riparian rights, a riparian owner cannot divert to nonriparian lands the water which he has a right to use upon riparian lands.

Same—Doctrine of Appropriation—Rights of Appropriator.

5. Under the doctrine of appropriation the right to the use of the waters flowing in a natural stream is extended to riparian and nonriparian lands alike, it being immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which they are taken.

Same.

6. An appropriator of water who has appropriated the entire flow of a stream may use all of it to the exclusion of riparian proprietors and junior appropriators, the only limitation imposed upon the extent of his appropriation being his needs and facilities for use.

2. Meaning of phrase "domestic purposes" in relation to riparian rights, see notes in *Ann. Cas.* 1912B, 621; *Ann. Cas.* 1914D, 563.

4. Nature of riparian rights and lands to which they attach, see notes in 9 *Ann. Cas.* 1235; 17 *Ann. Cas.* 829; *Ann. Cas.* 1913E, 709; *Ann. Cas.* 1915C, 1026; 41 *L. R. A.* 737.

6. Respective rights of appropriators and riparian owners, see note in 43 *Am. Dec.* 269.

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Same—Appropriation—Extent of Right.

7. If an appropriator's needs exceed the capacity of his distributing system, then the capacity of his means of diversion measures the extent of his right, and if the capacity of his distributing system exceeds his needs, then his needs limit the extent of his appropriation.

Same—Appropriation—First in Time, First in Right.

8. Priority of appropriation of water confers superiority of right, without reference to the character of the use, whether natural or artificial.

Same—Source of Right—Use of Water Subject to State Control.

9. An appropriator of water derives his right from the state and not from the national government, the use of waters flowing in natural streams in Montana being subject to state regulation and control.

Same—Appropriation may be Made from What Streams.

10. An appropriation of water is not confined to waters flowing in streams upon public land, but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary.

Same—Appropriation by Federal Government—Procedure.

11. Where the government of the United States desires to acquire the right to the use of waters flowing in natural streams in Montana, it must proceed as an individual to make an appropriation in compliance with the laws of the state.

Same—Injunction—Riparian Rights—Complaint—Insufficiency.

12. *Held*, that the common-law doctrine of riparian rights does not prevail, and has not prevailed in Montana since the enactment of the Bannack Statutes in 1865, but that the doctrine of appropriation does obtain and is controlling, and that therefore the complaint of an owner of agricultural land through which a stream was flowing in its natural channel the waters of which had been appropriated by defendant company and diverted so as to take all of them before they reached plaintiff's land, for an injunction asked for on the ground that, though not owning a water right on the stream, as riparian owner he was entitled to have such amount of the waters flow in the channel as was necessary for household purposes and for watering livestock, did not state a cause of action.

Appeal and Error—Obiter Dictum not Binding upon Court.

13. Observations made during the course of an opinion upon a subject not involved in the case do not require explanation and are not binding upon the court.

Appeals from District Court, Lewis and Clark County;
W. H. Poorman, Judge.

ACTION by Anna E. Mettler against the Ames Realty Company. From judgment of dismissal and from order denying an injunction, plaintiff appeals. Judgment and order affirmed.

8. On right of prior appropriation of water, see comprehensive note in 30 L. R. A. 665.

12. Injunction as remedy for wrongful diversion of watercourse, see note in Ann. Cas. 1912D, 13.

Messrs. Galen, Mettler & Toomey, for Appellant, submitted a brief; *Mr. Frank W. Mettler* argued the cause orally.

The sole question raised by the complaint, as we view its allegations, is whether the defendant has a right as an appropriator of water to change its point of diversion, under the provisions of section 4842 of the Revised Codes, in derogation of the riparian rights of the plaintiff. In other words, there is no conflict between plaintiff and defendant as to the use of the waters of Prickly Pear Creek, but simply the question whether the plaintiff, as a riparian owner, comes within the protection of the excepting clause of section 4842, which permits such change only "if others are not thereby injured." It was contended by counsel for defendant in the lower court that this clause applied only to other appropriations of water, and that the doctrine of riparian rights having been absolutely abrogated, plaintiff had no rights whatsoever that need be respected by defendant when it changed its point of diversion as an appropriator.

It is true that the complaint alleges that "the waters flowing in the natural channel of the said creek for many years last past have been used by plaintiff and her predecessors in interest for domestic and stock-raising purposes." This use, however, is only incidental to the right of the plaintiff to have the waters of the creek flow down the natural channel. In other words, it is not the use by plaintiff of the waters for domestic and stock-raising purposes that is being interfered with by defendant's change of the point of diversion, but it is plaintiff's right to have the waters flow down the natural channel of the creek.

Most of the decided cases in which the question of the right to change the point of diversion has arisen have been those in which other appropriators have made complaint. The statute, however, does not confine its protection to other appropriators. In at least one case this court has declared the rule in practically the same language as found in the statute:

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“A person entitled to the use of water may change the point of its diversion and may use it for other purposes than that for which it was originally appropriated, provided always, however, other parties are not injured thereby.” (*Head v. Hale*, 38 Mont. 302, 100 Pac. 222.)

One who has acquired title to lands bordering on or traversed by a stream before any valid appropriation of its waters becomes invested with all the rights of a riparian proprietor and any subsequent appropriation must be subject to his riparian rights. (40 Cyc. 708, note 36.) Every riparian owner is entitled to the natural flow of the water of a running stream through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the stream by other like appropriators. (40 Cyc. 560, note 47; *Campbell v. Flannery*, 29 Mont. 246, 74 Pac. 450.)

This does not imply any ownership or property right in the flowing water itself, but merely a right to have it continue in its accustomed channel and volume and to make a beneficial use of it while passing over the land to such reasonable extent as will not impair its usefulness to other riparian proprietors. (40 Cyc. 560, notes 48, 49.)

In the lower court, the defendant contending that the doctrine of riparian rights has been absolutely abrogated in this state, cited in support of its contention, *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398. An examination of this case, however, will disclose that the doctrine not only has not been abrogated, but that, on the contrary, it has been expressly and explicitly recognized. Almost the first proposition laid down by the court in the case is as follows: “The right to the use of running water is a corporeal right or hereditament which follows or is embraced by the ownership of riparian soil. It is a corporeal right running with riparian land.”

It is true that in the course of its opinion the court uses language which indicates that there has been a modification of

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the common-law rule as to riparian rights, by reason of our statutes for the appropriation of water. It is to be observed, however, with reference to such language, first, that it is explicitly stated to be by way of *obiter*; and second, that it is only the right to the use of the water by the riparian owner which has been modified by our doctrine of prior appropriation. As above stated the question of a possible conflict in use between a riparian owner and an appropriator is not necessarily involved in this case. It is the change of the point of diversion to the detriment of the riparian owner's right to have the water run through his land that is the gravamen of plaintiff's complaint.

As we read the case above cited, it declared that the very basis of the right to appropriate and use the waters of a stream by a nonriparian owner is a grant from some riparian owner, for it is said: "It is therefore apparent that absolute legal title to a water right can only be acquired by grant, express or implied, of the riparian owner of the land and water." The court in effect declares that while it is only by virtue of the statute of this state that an appropriation of water in derogation of the common-law rights of the riparian owner can be made, yet this very statute is subservient to those same riparian rights, for the court says: "But this privilege or right to appropriate the water of a stream can in any and every case be taken advantage of or exercised only by one who has riparian rights, either as owner of the riparian land or through grant of the riparian owner." How, then, can it be reasonably maintained that riparian rights have been abrogated in this state? As to the nonriparian owner the court says: "Of necessity he must acquire by grant, express or implied (or by condemnation under the power of eminent domain), from some riparian owner the right to exercise the statutory privilege."

The right of the defendant to change its point of diversion is conferred by the same statute (sec. 4842), which gave it the right to appropriate the water in the first instance. The right

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to appropriate the waters being subject to, and in fact based upon, the riparian rights of the land owners on the creek, equally so, then, is the right to change the point of diversion subject to those same riparian rights. It follows that the riparian right of the plaintiff is within the protection of the statute, and no change in the point of diversion by defendant could be made to the injury of such right.

No appearance on behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Prickly Pear Creek, a tributary of the Missouri River, flows through agricultural lands belonging to the plaintiff, and for many years plaintiff and her predecessors in interest have used such amount of the waters flowing in the creek as was necessary for household purposes and watering livestock. The defendant company also owns agricultural lands in the same vicinity, and, by virtue of an appropriation heretofore made, is entitled to use the waters from the same creek for irrigation purposes. Originally defendant diverted the waters used by it at a point on the creek below plaintiff's ranch, but on May 2, 1919, it changed the place of diversion to a point on the creek above plaintiff's lands, and since then has conveyed all of the waters of the creek around and away from plaintiff's ranch and upon its own lands, thereby depriving plaintiff of any use of the waters during the irrigation season of each year, and threatens so to continue diverting and using the water. These facts are set forth somewhat more in detail in the complaint, upon which an injunction *pendente lite* and a permanent injunction after trial was sought.

The lower court sustained a general demurrer to the complaint and denied the application for a temporary injunction. Plaintiff elected to stand upon her pleading, suffered a judgment of dismissal to be entered, and appealed therefrom and from the order denying the injunction.

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Plaintiff does not claim that she has appropriated any of the waters of Prickly Pear Creek, and does not complain that defendant diverted more water than the amount of its appropriation.

It is axiomatic that, if plaintiff is not entitled to have the [1,2] waters of Prickly Pear Creek flow down its natural channel through her land, she is not injured by the acts of the defendant in changing the place of diversion, and, if not injured, she cannot complain. But it is urged vigorously that, because of the relative situation of her land and the creek and her ready access to the water, plaintiff is entitled to assert the common-law doctrine of riparian rights under which every proprietor of land on the bank of a natural stream has an equal right to have the waters of the stream continue to flow in its natural course as it was wont to do, without diminution in quantity or deterioration in quality, except so far as either of these conditions may be affected by the reasonable use of the waters by upper riparian proprietors. Under that doctrine the right to the use and flow of the waters of a stream is an inherent incident to the ownership of riparian lands, a right annexed to the soil, not as an easement or appurtenance, but as part and parcel of the land itself (*Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398), and it follows from the very nature of the right that it is not dependent upon user to any extent. Use does not create it and disuse cannot affect it adversely. If the riparian proprietor does not care or need to use the waters, he still has the right to have them flow in their accustomed channel (*Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674), though he cannot insist upon an absolute and exclusive right to the flow of all the waters in the stream, for every such riparian proprietor upon the same stream has the same right of reasonable use, and the right of each is qualified by the corresponding rights of the others. (*McEvoy v. Taylor*, 56 Wash. 357, 26 L. R. A. (n. s.) 222, 105 Pac. 851.) As between riparian right claimants, the use of water

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for the so-called natural purposes, household and domestic use, drinking and watering livestock, is held to be paramount to artificial uses, irrigation and other industrial purposes. (*Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725.)

Some confusion has arisen over the proper use of the term [3] “riparian,” but there cannot be any occasion for it. A riparian proprietor is one whose land borders upon a natural stream or through whose land it flows. (Black’s Law Dictionary.) The term “littoral” is used to characterize lands bordering upon a lake or the sea. (Bouvier’s Law Dictionary.) Under this doctrine one who does not own any [4] land adjoining upon a stream cannot claim riparian rights and a riparian owner cannot exercise such rights in respect to lands which are not riparian. In other words, he cannot divert to nonriparian lands the water which he has a right to use upon riparian lands. (*Crawford Co. v. Hathaway*, 67 Neb. 325, 108 Am. St. Rep. 647, 60 L. R. A. 889, 93 N. W. 781.)

The doctrine of appropriation extends the right to the use [5-8] of the waters flowing in a natural stream to riparian and nonriparian lands alike (Long on Irrigation, sec. 125), and it is immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which the waters are taken (1 Wiel on Water Rights, sec. 363). Furthermore, this doctrine sanctions the right of an appropriator to the use of all the waters of a stream, to the exclusion of riparian proprietors and junior appropriators, if the entire flow of the stream has been appropriated by him (Long on Irrigation, sec. 132), and the only limitations imposed upon the extent of his appropriation are his needs and facilities for use. If his needs exceed the capacity of his distributing system, then the capacity of his means of diversion measures the extent of his right. If the capacity of his distributing system exceeds his needs, then his needs limit the extent of his appropriation. (*Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575.) Another rule peculiar to the doc-

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trine of appropriation as distinguished from the doctrine of riparian rights, finds expression in the maxim, "First in time, first in right," or, in other words, priority of appropriation confers superiority of right (1 Wiel on Water Rights, sec. 299), and that, too, without reference to the character of the use, whether natural or artificial (*Id.*, sec. 378).

In California a dual system of water right law has been [9-12] recognized almost from the time of the first settlement after the gold discovery. The common-law doctrine of riparian rights, modified from time to time to suit natural conditions, has been applied wherever the lands have been reduced to private ownership, except as against rights acquired by prior appropriation while the lands were a part of the public domain; and the doctrine of appropriation has been applied to waters upon the lands belonging to the state or to the United States. The California rule has been followed, in whole or in part, by Oregon, Washington, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. Colorado early rejected the common-law doctrine as unsuited to the natural conditions in that state and adopted the doctrine of appropriation as providing the only means for securing the right to use water for agricultural, mining, and other beneficial purposes, and that rule has been followed generally in Arizona, Idaho, New Mexico, Utah, Wyoming, and in Nevada since the decision in *Vansickle v. Haines*, 7 Nev. 249, was overruled in *Jones v. Adams*, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442, and in *Reno S. M. & R. Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364, 4 L. R. A. 60, 21 Pac. 317.

Controversies between appropriators and riparian proprietors without appropriations have given rise to almost endless litigation in the western states. Numerous cases before the courts of last resort are cited and analyzed somewhat in Long on Irrigation (second edition) and Wiel on Water Rights (third edition), and no useful purpose would be

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served by further reference here. It is to be observed that in applying the doctrine of riparian rights the supreme court of California proceeded upon the theory that the United States, as the original owner of the public lands and the streams bordering upon or flowing through them, had the common-law rights of a riparian proprietor; that, whenever a grant of public riparian lands was made without reservation, the patentee succeeded to the same riparian rights which the United States had enjoyed; and that any right acquired by appropriation of water on public land was founded in grant from the United States in virtue of the congressional enactments of 1866, 1870, and later statutes. On the other hand, the courts affirming the Colorado doctrine have proceeded upon the theory that the use of water in natural streams, whether upon public or private lands, is subject to state regulation and control; that in respect to public and privately owned lands lying in the same state the United States, as land owner, has no greater rights than the individual land owner; that the common-law doctrine of riparian rights is unsuited to the conditions prevailing in the arid or semi-arid states of the Rocky Mountain region, and for that reason, never prevailed, or, if ever recognized, was thereafter repudiated, and therefore neither the United States nor the patentee has such rights, and that it is competent for any state so situated to adopt the doctrine of appropriation as the only means through which the beneficial use of water flowing in the natural streams may be enjoined, and that the appropriator derives his right from the state in the exercise of local sovereignty.

Under the California doctrine the rights of parties who claim under grants from the federal government must be determined by reference to laws enacted by the Congress pursuant to the provisions of section 3, Article IV, of the Constitution of the United States, and a patentee under a grant without reservations acquired vested rights which a state cannot impair. Under either doctrine the *corpus* of running

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water in a natural stream is not the subject of private ownership, though this elementary principle is apparently overlooked in some of the decided cases. Such water is classed with light and the air in the atmosphere. It is *publici juris* or belongs to the public. A usufructuary right or right to use it exists, and the *corpus* of any portion taken from the stream and reduced to possession is private property so long only as the possession continues.

These principles were borrowed by the common law from the civil law and in turn were borrowed by the law of appropriation from the common law. To recapitulate: The common-law doctrine excludes the nonriparian land owner from the use of water and confines the riparian owner in its use to riparian lands. It classifies the uses to which water may be applied and gives preference to the so-called natural uses.

Contiguity to the stream is the foundation of the doctrine of riparian rights, but it is disregarded by the doctrine of appropriation. Since the common-law rights attach to the riparian land as a part of it, no formalities are needed to exercise those rights; on the other hand, certain proceedings are necessary to acquire rights by appropriation. Use is the foundation of the law of appropriation, and the rights acquired thereunder may be lost by nonuse, whereas nonuse does not affect riparian rights. Equality of rights and reasonable use distinguish the common-law doctrine, while the appropriation rule sanctions exclusive use measured by priority, and, by fixing the amount of every appropriation, aims at certainty and the avoidance of needless litigation. Each of these doctrines has been modified greatly by recent legislation and judicial decisions.

Many cases involving the law of irrigation and water rights in western jurisdictions have been reviewed by the supreme court of the United States. The conclusions announced are not always readily reconcilable one with another, but indicate rather a gradual development of the law. In *Starr v. Beck*,

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133 U. S. 541, 551, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350 [see, also, Rose's U. S. Notes], the court declared that the rights of a riparian owner attach when the government transfers title, and that they cannot be subsequently invaded.

In *United States v. Rio Grande Irr. Co.*, 174 U. S. 690, 43 L. Ed. 1136, 19 Sup. Ct. Rep. 770 [see, also, Rose's U. S. Notes], it was held competent for a state to change the common-law rule with reference to the use of waters, provided such change does not operate to impair or defeat the riparian rights of the government to the flow and use of waters in natural streams upon the public domain, or countenance interference with commerce on navigable waters.

Finally, in *Winters v. United States*, 207 U. S. 564, 577, 52 L. Ed. 340, 28 Sup. Ct. Rep. 207, 212 [see, also, Rose's U. S. Notes], the court declared that the "power of the government to reserve the waters [in streams on a government reservation] and exempt them from appropriation under the state laws is not denied, and could not be."

Standing alone, these pronouncements would seem to confirm the California theory of federal proprietary title with the common-law riparian rights attached thereto and passing from the United States to the patentee, free from state interference or control. But it is to be observed that *Sturr v. Beck* arose in Dakota territory, where the common-law doctrine of riparian rights prevailed, and the decision is to be understood with reference to that fact. In *United States v. Rio Grande Irr. Co.* the court reviewed the Acts of Congress of July 26, 1866 (3 Fed. Stats. Ann., 2d ed., p. 1002 (U. S. Comp. Stats., sec. 4674), of March 3, 1877 (8 Fed. Stats. Ann., 2d ed., p. 892 (U. S. Comp. Stats., sec. 4674), and of March 3, 1891 (8 Fed. Stats. Ann., 2d ed., p. 803 (U. S. Comp. Stats., sec. 4934), and concerning them said: "Obviously by these Acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. * * * And in reference to all these cases of purely local interest the obvious

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purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries." *Winters v. United States* involved the right to the use of the waters of Milk River in this state, and the decision turned upon a construction of the treaty made by the United States with the Indians, under which a large portion of the Fort Belknap reservation was opened to settlement.

In *Hardin v. Jordan*, 140 U. S. 384, 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, the court declared that a grant from the government, without reservation, is to be construed according to the laws of the state in which the lands lie.

In *Clarke v. Nash*, 198 U. S. 361, 370, 4 Ann. Cas. 1171, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, 679 [see, also, Rose's U. S. Notes], the court said: "The rights of a riparian owner in and to the use of water flowing by his land are not the same in the arid and mountainous states of the west that they are in the states of the east. These rights have been altered by many of the western states, by their Constitutions and laws, because of the totally different circumstances in which their inhabitants are placed from those that exist in the states of the east, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated."

In *Kansas v. Colorado*, 206 U. S. 46, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655 [see, also, Rose's U. S. Notes], the court apparently departed from the theory that the rights of an appropriator of water from a stream upon the public domain rests in grant from the government evidenced by the several federal statutes, and treated the question from the standpoint of power inherent in local sovereignty, regardless of the so-called proprietary rights of the United States, and de-

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clared that every state in the Union "may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west of the appropriation of waters for the purposes of irrigation shall control."

In *Producers' Oil Co. v. Hanzen*, 238 U. S. 325, 338, 59 L. Ed. 1330, 35 Sup. Ct. Rep. 755, 759, the same principle was reiterated. The court said: "The effect of riparian rights, if established, would depend upon the local law," and in *Norton v. Whiteside*, 239 U. S. 144, 153, 60 L. Ed. 186, 36 Sup. Ct. Rep. 97, 100, in reference to the claim of riparian rights on navigable waters, the court said: "It was long since affirmatively settled that such claim solely involves a question of state law."

If, then, it may be accepted as finally settled that a patentee from the government has such rights only, in virtue of his conveyance, as are recognized by the law of the state where the lands are situated, it follows that the solution of the question now before us depends upon the answer to the inquiry: What is the rule in this state respecting the use of water for irrigation and other beneficial purposes?

It is interesting to note that since the organization of Montana territory—a period of more than fifty years—no owner, claimant, or occupant of riparian lands has ever asserted in the courts the common-law doctrine of riparian rights, as applied to the use of water, until the present action was instituted, so far as our investigation discloses. It is true that there are numerous reported cases, beginning with *Columbia Min. Co. v. Holter*, 1 Mont. 296, in which observations are made upon some phase or other of the riparian rights doctrine, but even a cursory examination of the facts will disclose that the question of riparian rights was not involved in any of them, and that the comment made upon the subject in every instance is purely *obiter dictum*. For any or all of those expressions it is not necessary to offer explanation or excuse. The language of Honorable Simeon E. Baldwin is

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particularly pertinent here: "If the writer of a judicial opinion has permitted his pen to move too fast and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed." (18 Yale Law Journal, 1, 8.)

Long on Irrigation classes Montana with the states which adhere to the California doctrine, and *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081, is cited to justify the classification. After referring to the elementary principle that the owner of nonriparian land cannot initiate a right to appropriate water from a stream flowing through privately owned land by trespassing upon such land, we said that our statutes only apply to appropriations made from streams on public land and to such other appropriations "as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners." The use of the terms "riparian rights" evidently has been misleading, but they were employed only to indicate rights of access to the stream, and not the rights of continuous flow and use of the waters as recognized by the common law.

We feel entirely at liberty to treat the matter as one of first impression in this jurisdiction and to seek the public policy of the state and of the territorial government which preceded it by reference to the legislation which has been enacted upon the subject.

The First Territorial Legislative Assembly passed an Act (approved January 12, 1865) "to protect and regulate the irrigation of land in Montana territory." That Act provided that any owner or holder of a possessory right or title to land on the bank or margin or in the neighborhood of any stream should be entitled to the use of the water of such stream for the purpose of irrigation, and, if his land was too far removed from the stream to obtain access otherwise, he should have a right of way for the necessary ditch or ditches over the intervening property. (Bannack Statutes, p. 367.)

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Certain sections of that Act were declared to be invalid (*Thorp v. Woolman*, 1 Mont. 168), and the remaining portions were replaced by an Act of the Sixth Legislative Assembly (1870), which in effect re-enacted the first provisions above. (Laws 1869-70, p. 57.) That Act was carried forward into the Codified Statutes of 1872 as Chapter 34, with the addition of section 11, which provides: "That in all controversies respecting the right to water in this territory, whether for mining, manufacturing, agriculture, or other useful purpose, the rights of the parties shall be determined by the dates of appropriation respectively, with the modifications heretofore existing under the local laws, rules, or customs and decisions of the supreme court of the territory."

In 1877 an Act was passed by the Tenth Legislative Assembly which regulated the sale of surplus water. (Laws 1877, p. 406.) In 1879 the first section of Chapter 34, Laws of 1872, was amended, and by the amendment the right of one to appropriate all the water of a stream was recognized, provided that quantity was necessary for his use, and provided further that, if at any time a surplus over and above his needs existed, such surplus should be turned back into the stream for the use of those having junior rights. (Laws 1879, p. 52.) The Act passed in 1885 (Laws 1885, p. 130) provided only for a method of procedure to be observed in making an appropriation of water, and section 5 of that Act declared: "As between appropriators, the one first in time is first in right." The Compiled Statutes of 1887 merely carried forward Chapter 34, Laws of 1872, as amended by the Act of 1879, and the Acts of 1877 and 1885 above. (Comp. Stats., p. 992.) This completes the history of our water right legislation up to the time Montana was admitted into the Union.

Section 15, Article III, of our state Constitution provides: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others,

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for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use." In 1891 a special eminent domain statute was enacted which provided a ready means for securing a right of way for ditches, flumes, or canals for irrigation and other purposes. (Laws 1891, p. 295.) The provisions regulating the appropriation and use of water which came into existence with the adoption of the Codes of 1895 (secs. 1880-1902, Civ. Code) are somewhat more comprehensive than the laws upon the same subjects theretofore in force, but they do not depart therefrom in any essential particular so far as the question now involved is concerned; on the contrary, section 1884 continued the recognition of the right of one to appropriate all the waters of a stream under like restrictions as imposed by the amendment made in 1879, referred to above. In 1899 two Acts were passed. One changed the standard of measurement of water (Laws 1899, p. 126), and the other provided for the appointment of commissioners to measure and distribute waters the right to which had been, or which should thereafter be, adjudicated. (Laws 1899, p. 136). In 1905 a statute was enacted (Laws 1905, Chap. 44) which provides: "That the government of the United States may by and through the secretary of the interior, or any person by him duly authorized to act in that behalf, appropriate the water of streams or lakes within the state of Montana in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals." With slight additions and amendments, not material here, the law has continued to the present time.

These several provisions must be accepted as indicating the public policy of Montana respecting the subject now under review. They recognize: (1) The right to the use of water on nonriparian lands, even though such lands lie beyond the watershed of the stream from which the water is taken; (2)

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the right of one to take and use all of the waters of a stream, if appropriated by him and necessary to his use and actually used by him for a lawful purpose; (3) that the one first in time is first in right without reference to the so-called natural and artificial uses; (4) that an appropriator derives his right from the state, and not from the national government, and that the use of waters flowing in natural streams in this state is subject to state regulation and control; (5) that an appropriation is not confined to waters flowing in streams upon public land, but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary, as authorized by the language of the Constitution quoted above (*Prentice v. McKay*, above); and (6) that, in order for the government of the United States to acquire the right to the use of waters flowing in the natural streams in this state, it must proceed as an individual to make an appropriation in compliance with the laws of this state.

In speaking of the territorial Act of 1865 above, Judge Knowles said: "As far as the legislative assembly of Montana had the power, they repealed the common-law doctrine in regard to riparian proprietors." (*Thorp v. Freed*, 1 Mont. 651, 657.) In *Smith v. Denniff*, 24 Mont. 20, 23, 81 Am. St. Rep. 408, 50 L. R. A. 741, 60 Pac. 398, 399, Mr. Justice Pigott, speaking for the court, said: "The doctrine of 'prior appropriation' confers upon a riparian owner, or one having title to a water right by grant from him, the right to a use of the water of a stream which would be unreasonable at the common law, and to this extent the doctrine of prior appropriation may be said to have abrogated the common-law rule." It may be conceded that in each instance the observations were not necessary to the decision rendered, but they do, respectively, represent the views of the distinguished jurists who in the early days were largely instrumental in formulating the public policy of Montana respecting this subject. See, also, the article of Judge Hunt, erstwhile

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Associate Justice of this court, United States District Judge for the District of Montana, and now United States Circuit Judge for the Ninth Circuit, in 17 Yale Law Journal, 585.

It is submitted that the policy established by the measures above is irreconcilable with the application of the doctrine of riparian rights even in the modified form in which that doctrine now prevails in the states adhering to the California rule; that our Constitution and statutes proceed upon the theory that artificial irrigation is absolutely necessary to the successful cultivation of large areas of land within the state; that the doctrine of appropriation was born of the necessities of this state and its people; and that it was intended to be permanent in its character, exclusive in its operation, and to fix the status of water rights in this commonwealth.

"The common law, as it existed in England at the time of the settlement of the American Colonies, has never been in force in all of its provisions in any colony or state of the United States. It has been adopted so far only as its general principles were suited to the habits and condition of the colonies, and in harmony with the genius, spirit, and objects of American institutions. Different political and geographical conditions may justify modifications, and whether common-law rules will be followed strictly in the United States will, necessarily, where no vested rights are actually concerned, depend on the extent to which they are reasonable and in accord with public policy and sentiment. And from this circumstance it is clear that what may be the common law in one state is not necessarily so considered in another." (Ann. Cas. 1913E, p. 1232, note.) As emphasizing the correctness of this rule, the supreme court of the United States, in *Boquillas Cattle Co. v. Curtis*, 213 U. S. 345, 53 L. Ed. 822, 29 Sup. Ct. Rep. 495 [see, also, Rose's U. S. Notes], said: "Patentees of a ranch on the San Pedro have not the same rights as owners of estates on the Thames."

Our conclusion is that the common-law doctrine of riparian rights has never prevailed in Montana since the enactment of

the Bannack Statutes in 1865; that it is unsuited to the conditions here; and that the complaint in this action does not state facts sufficient to entitle the plaintiff to relief.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS and COOPER concur.

MR. CHIEF JUSTICE GALEN, being disqualified, takes no part in the foregoing decision.

SKLAR, RESPONDENT, v. BELCHER, APPELLANT.

(No. 4,495.)

(Submitted September 19, 1921. Decided October 24, 1921.)

[201 Pac. 681.]

Contracts—Party Liable—Descriptio Personae—Evidence.

1. Evidence *held* to show that a contract made with defendant "of the Lewiston Hide & Fur Co." was made with him in his individual capacity, and that the words quoted were merely descriptive of defendant and not intended to indicate that the company was bound.

Appeals from District Court, Fergus County; Jack Briscoe, Judge.

ACTION by Jacob Sklar against James C. Belcher. Judgment for plaintiff, and defendant appeals from it and from an order denying a new trial. Affirmed.

Messrs. Cheadle & Cheadle, for Appellant, submitted a brief; *Mr. E. K. Cheadle* argued the cause orally.

Mr. Ralph J. Anderson and *Mr. E. K. Matson*, for Respondent, submitted a brief; *Mr. Anderson* argued the cause orally.

Counsel for the appellant state in their brief that the original contract, which is marked Plaintiff's Exhibit "A,"

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was really between the Lewistown Hide & Fur Company and James C. Belcher. It is true that in the contract Jacob Sklar, the respondent, is referred to as "Jacob Sklar, of the Lewistown Hide & Fur Company," but the contract was executed in his name individually. The question as to whether or not the contract was with Jacob Sklar individually, or as the agent of the Lewistown Hide & Fur Company, must be determined from the contract itself. (*Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279.) The use of the word "of" in a contract followed by the name of a company or organization is held to be words describing the person, and not an agreement creating an obligation on the part of the organization or person mentioned following the word "of." (*Shackleton v. Allen Chapel, African M. E. Church*, 25 Mont. 421, 65 Pac. 428; *Donovan v. Welch*, 11 N. D. 113, 90 N. W. 262; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff recovered a judgment against the defendant for \$350 and interest, and defendant appealed therefrom, and from an order denying him a new trial.

The only question involved is whether the contract in [1] question, for the sale of 3,500 pounds of wool by defendant, was made with the plaintiff or with the Lewistown Hide & Fur Company. The contract recites that defendant "has sold to Jacob Sklar, of Lewistown Hide & Fur Co.," etc. Upon the trial each party proceeded upon the theory that the contract is ambiguous, and by the introduction of evidence sought to show the relationship existing between Sklar and the company at the time the contract was made. The evidence is not satisfactory, but we are of the opinion that it is sufficient to warrant the trial court in concluding that Sklar was operating under an agreement with the company by which he was to purchase hides, pelts, and wool on his own account, and resell to the company at the prevailing

market price; that, in order to enable him to conduct his business, the company advanced money to him on his several contracts; and that the \$350 received by defendant was paid by the company for the use and benefit of Sklar, and that Sklar had repaid the amount to the company upon defendant's failure to deliver the wool. Upon this theory the conclusion is warranted that the contract was made with Sklar in his individual capacity, and that the words "of the Lewistown Hide & Fur Co." are merely descriptive, and were not intended to indicate that the company was bound. We find no error in the record.

The judgment and order are affirmed.

'Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

IN RE STINGER ESTATE.

(No. 4,477.)

(Submitted September 22, 1921. Decided October 24, 1921.)

[201 Pac. 693.]

Probate Proceedings—New Trial—Executors and Administrators—Guardian and Ward—Claims—Verification—Jurisdiction — Equity — Subrogation — Laches — Indians — Contracts—Promissory Notes—Accommodation Makers—Liability—Statute of Limitations.

New Trial—Lies, When.

1. Under section 6794, Revised Codes, a new trial—a re-examination of the facts—lies where an error of law has been committed by reason of misapplication of law to the facts.

Probate Proceedings—New Trial Lies When.

2. Where formal pleadings authorized or required by the statute in a probate proceeding, no matter how denominated, present issues of fact, a new trial lies even though the proceeding was disposed of solely upon a question of law.

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Same—Pleadings Presenting Question of Fact—Decision of Question of Law—Motion for New Trial Proper.

3. *Held*, under the above rules, that where a guardian petitioned the court in a probate proceeding for an order directing an administrator to pay certain claims allowed against the estate as due his wards to himself personally, on the ground that he had become subrogated to their rights, to which petition objections in the nature of answers were filed, petitioner filing replies, raising issues of fact, the court denying the petition for lack of jurisdiction to determine the equitable claim of subrogation, a motion for new trial lay.

Same—Minors—Guardian Proper Person to Make Affidavit.

4. Where a minor is incompetent to make an affidavit, his guardian is the proper person to make it.

Same—Claims by Guardian—Verification—Sufficiency.

5. Where a claim against an estate showed on its face that it was made by claimant as guardian, the fact that the verification required by section 7526, Revised Codes, was made by him individually without any reference to his official capacity as guardian did not render the claim fatally defective.

Same—Claims—Verification—Absence of Notary's Seal—When not Fatal Defect.

6. Section 320, subdivision 6, Revised Codes, prior to amendment thereof by Chapter 103, Laws of 1909, did not require a notary public to affix his seal to an affidavit; hence its absence from a verification to a claim against an estate made in 1907 did not render the verification insufficient.

Same—Probate Courts—Jurisdiction—Questions of Equitable Cognizance—When Properly Determinable.

7. Though the district court sitting in probate is without power, as a general rule, to determine questions of equitable cognizance, yet where a determination of such questions is a necessary incident to the carrying out of the powers expressly granted to it, it may take jurisdiction.

Same—Claims Against Estate—Subrogation—Jurisdiction.

8. A guardian petitioned the probate court to direct the administrator of an estate to pay to him personally claims due his wards which had been allowed by the administrator and approved by the judge, on the ground that he had become subrogated to the rights of the minors by payment to them of the notes upon which the claims were based. *Held*, under the above rule (par. 7) that the court having the power, directly granted, to direct payment and to determine to whom payment was due, it could properly pass upon the necessarily incidental question whether petitioner was entitled to payment under the principle of subrogation.

Same—Guardians—Claims—Subrogation—Laches.

9. Where a guardian had made full and complete settlement with his wards, delays in arriving at a settlement were of no concern to an estate in a proceeding whereby he sought to obtain an order directing the administrator to pay to him allowed and approved claims, to the rights of his wards in which he alleged he had become subrogated.

Same—Claims—Payment—Laches.

10. While an owner of a claim against an estate may take action to expedite payment where unreasonable delay has occurred, it is not obligatory upon him to do so; he may assume that claims will be paid in due course of administration when the estate is in condition to pay, without laying himself open to a charge of laches.

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Same—Claims—Guardians—Subrogation—When Proper.

11. Where a guardian had make full settlement with his wards of the affairs of his trust, including the proceeds of two promissory notes made payable to him in his official capacity, he was entitled to an assignment of the notes to him, in the absence of which subrogation could be decreed under the principle that equity will consider as done what in good conscience should have been done.

Same—Claims—Guardians—Unwarranted Use of Trust Funds—Subrogation.

12. Under the rule that when one, acting in a fiduciary or representative capacity, uses his own funds to satisfy an obligation for the benefit of his trust, he is subrogated to the rights of his principal, *held* that a guardian who, having made an unwarranted investment of trust funds, was compelled to account therefor, was not deprived of his right to subrogation by the fact that the investment was unlawful.

Indians—Contracts—Enforceability.

13. *Held*, that section 4087, United States Compiled Statutes, declaring invalid contracts with an Indian not a citizen of the United States unless approved by the secretary of the interior and the commissioner of Indian affairs, refers to contracts affecting Indian allotments, and therefore did not render void promissory notes signed by an Indian, which did not involve allotment rights.

Same—May Make Valid Contracts.

14. Unless prohibited by statute, an Indian may make valid contracts.

Promissory Notes—Accommodation Maker Primarily Liable, When.

15. One who signed a note on its face in conjunction with others was primarily liable for its payment, even though he was an accommodation maker only.

Same—Co-makers—Statute of Limitations—Commences to Run, When.

16. An accommodation maker of a promissory note held liable for its payment was not prejudiced in her right to reimbursement from the principal debtor by the fact that the statute of limitations had run against her co-makers, since the limitation of an action as against him commenced to run only from the date the note was paid.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

PETITION by J. M. Keith for an order directing payment of claims by Andrew Stinger, administrator of the estate of Louise Stinger, deceased. Petition denied, and from an order granting a motion for new trial, the administrator and other objectors appeal. Affirmed.

11. The right of subrogation, see note in 99 Am. St. Rep. 474.

Right of one who advances money for payment of debt or encumbrance against decedent's estate to be subrogated to the rights of the creditor, see notes in 11 Ann. Cas. 676; Ann. Cas. 1915C, 130.

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Mr. E. C. Mulroney, Mr. B. K. Wheeler, Mr. Frank Woody, Mr. John P. Swee, and Mr. William Wayne, for Appellants, submitted a brief; *Mr. Wheeler and Mr. Wayne* argued the cause orally.

We contend that the respondent, being dissatisfied with the decision of the court holding that it had no jurisdiction to entertain his petition, his only remedy was by appeal under the provisions of section 7098, Revised Codes, subdivision 3. The same court which heard his petition and decided that it had no jurisdiction could not, by entertaining a motion for a new trial, sit as a reviewing court and, upon a change of mind, reverse itself. The motion for a new trial was not applicable in the instant proceeding and the court was in error in entertaining it. (*State ex rel. Ferry Co. v. District Court*, 49 Mont. 595, 144 Pac. 159; *State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613; *In re Antonioli's Estate*, 42 Mont. 219, 111 Pac. 1033; *State ex rel. McHatton v. District Court*, 55 Mont. 324, 176 Pac. 608.)

The whole doctrine of subrogation is of equitable cognizance only. The position of the appellants on this phase of the case is that the probate court has no jurisdiction to hear and determine a matter which is of purely equitable cognizance. The probate court in this state is one of statutory authority only, and has only such jurisdiction and powers as are expressly conferred, or necessarily implied from those granted. (*Bullerdick v. Hermsmeyer*, 32 Mont. 541, 81 Pac. 334; *Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385; *In re Dolenty's Estate*, 53 Mont. 33, 161 Pac. 524; *Davidson v. Wampler*, 29 Mont. 61, 47 Pac. 82; *State v. District Court*, 18 Mont. 481, 46 Pac. 259; *In re Higgin's Estate*, 15 Mont. 474, 502, 28 L. R. A. 116, 39 Pac. 506; *State v. District Court*, 54 Mont. 172, 168 Pac. 522.)

The next contention of the appellants is that, on the merits, Keith is not entitled to subrogation to any rights which his wards might have had, for the reason that he does not oc-

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copy that position of rectitude and good conscience which is the basis upon which equitable relief is extended. "He who comes into equity must do so with clean hands." The maxim denies all relief, however well founded the suitor's claim to it may otherwise be, if in granting the relief sought the court would be required, even by implication, to affirm the validity of an unlawful transaction or agreement, or to give its approval to inequitable conduct. (Pomeroy's Equity Jurisprudence, sec. 400; *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 20; *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 293.)

"Equity aids the vigilant, not those who sleep on their rights." The claim against the estate of Louise Stinger, such as it was, was presented and allowed on September 10, 1907. Keith's petition asking that he be subrogated to the rights of his ward was filed on September 7, 1916. Louise Stinger was an accommodation maker. If Mr. Keith ever had any equitable rights in the premises, we say that they have long since been lost by laches on his part, with the accompanying sacrifice of the rights of his wards in case his position should be upheld. (*Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764; *Mantle v. Speculator Mining Co.*, 27 Mont. 477, 71 Pac. 665.)

If the estate of Louise Stinger should be compelled to pay the claim of Keith, she being only an accommodation maker, the estate could not compel her cosureties or the principal maker to contribute, the statute of limitations having been permitted to run, as to them, through Keith's negligence. (*Cocke v. Hoffman*, 5 Lea (Tenn.), 105, 40 Am. Rep. 23; *Shelton v. Farmer*, 9 Bush (Ky.), 314; *Cochran v. Walker*, 82 Ky. 220, 56 Am. Rep. 891; *Stockmeyer v. Oertling*, 35 La. Ann. 467; *Long v. Miller*, 93 N. C. 227; *Green v. Greensboro Female College*, 83 N. C. 449, 35 Am. Rep. 579.)

Another reason why Keith should not be allowed to recover in this matter is because of the fact that the statute of limitations having run against the principal maker, the surety

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or accommodation maker is discharged. (Secs. 5877, 5968, Rev. Codes.)

“A claim barred by the statute of limitations as against the principal debtor is barred also as against the surety.” (*Auchampaugh v. Schmidt*, 70 Iowa, 644, 59 Am. Rep. 459, 27 N. W. 805; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833.) “If a creditor to whom two persons are obligated, one as principal and the other as surety, release the former, he also discharges the latter.” (*Brown v. Chicago etc. Ry. Co.*, 76 Neb. 792, 107 N. W. 1024.) “When a cause of action against a principal becomes barred by the statute of limitations, an action against the surety on the notes is also barred. (*Mulvane v. Sedgley*, 63 Kan. 105, 55 L. R. A. 552, 64 Pac. 1038; *Shutts v. Fingar*, 100 N. Y. 539, 53 Am. Rep. 231, 3 N. E. 588.)

Louise Stinger, at the time of making the note in question, and, in fact, was an Indian and a ward of the government, and as such she could not enter into an agreement unless she complied with certain requirements of United States Compiled Statutes of 1916, section 4087. (*In re Sanborn*, 148 U. S. 222, 37 L. Ed. 429, 13 Sup Ct. Rep. 577 [see, also, Rose's U. S. Notes]; *Smith & Steele v. Martin*, 28 Okl. 836, 115 Pac. 866; *Green v. Menominee Tribe*, 233 U. S. 558, 58 L. Ed. 1093, 34 Sup. Ct. Rep. 706.)

Messrs. Murphy & Whitlock and *Mr. Thos. N. Marlowe*, for Respondent, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

In Montana, the only method that the trial court has of correcting an error of law, if it makes one, is by granting a motion for new trial, and it was properly granted in this case. The pleadings disclose that there were issues of fact raised by the pleadings, and there was likewise considerable conflict in the testimony upon some of those issues. It matters not that the decision of the court was based upon a purely legal ground, as that question goes solely to the merits and does not at all

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affect the question of the propriety of a motion for new trial. We believe that our position is supported by the decision of this court in the case of *In re Davis*, 27 Mont. 235, 70 Pac. 721, where a motion was made to dismiss the appeal from an order denying a new trial on the theory that a motion for new trial was not proper in that proceeding, which was a probate proceeding.

The probate court had jurisdiction of Mr. Keith's petition for subrogation. A court must necessarily have power to hear and determine all questions of law the determination of which is ancillary to a proper judgment. (Ross on Probate, 217.) In California the Code and constitutional provisions referring to probate are practically identical with our own, and we refer to the following cases as supporting our position upon the question of jurisdiction. (*In re Clary*, 112 Cal. 292, 44 Pac. 569; *Estate of Burton*, 93 Cal. 459, 29 Pac. 36; *In re Warner's Estate*, 6 Cal. App. 361, 92 Pac. 191; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Hayden v. Hargan*, 202 Ill. App. 544; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234; *Estate of Davis*, 27 Mont. 490, 71 Pac. 757; *In re Cummings' Estate*, 143 Cal. 525, 77 Pac. 479.)

The weight of authority is that in cases where a person occupying a position of trust such as an administrator or guardian is required to account to the heirs, or to the wards, as the case may be, he may rely for reimbursement upon any claim which they had against a third person. (37 Cyc. 439, 440.) The following very recent cases are typical of the holdings generally: *Smith v. Moore*, 109 S. C. 196, 95 S. E. 351; *Franzell v. Franzell*, 153 Ky. 171, 154 S. W. 912; *Buskirk v. Sanders*, 70 W. Va. 363, 73 S. E. 937 (a case similar to this, where the guardian paid off a lien and was held to be subrogated to the right of the holder thereof); *Flowers v. Reece*, 92 Ark. 611, 123 S. W. 773; *Earle v. Coberly*, 65 W. Va. 163, 17 Ann. Cas. 479, 64 S. E. 628.

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Appellants next submit that Mr. Keith is barred because of the fact that he allowed the statute of limitations to run against the other signers of the note, and that one of these was the principal maker. Let us assume, for the sake of argument, that Stinger was the principal maker, and we will likewise admit that the relationship of suretyship may be shown by parol. Yet we submit that while the discharge of the principal likewise discharges the surety, such is not the case where the discharge results from the operation of law. (32 Cyc. 228; *Daniel v. Harvin*, 10 Tex. Civ. App. 439, 31 S. W. 421; *Nelson v. First Nat. Bank*, 69 Fed. 798; 8 C. J. 617.) The case of *Charbonneau v. Bouvet*, 98 Tex. 167, 82 S. W. 460, is exactly in point, and holds that although the statute of limitations has run as to the principal debtor, this does not bar the claim against the surety's estate, which would be the exact situation here, if the statute of limitations had run as against the other signers before the claim was presented and allowed. It should likewise be noted in this connection that a surety who is seeking exoneration or contribution bases his claim not upon the instrument representing the original obligation, and consequently the statute of limitations, as pointed out in the preceding point, begins to run only from the time of payment (see 18 L. R. A. (n. s.) 585), so that in this case if Louise Stinger was a surety, her rights have been in no way prejudiced by allowing the statute of limitations to run after the claim was presented and allowed; and if she was principal, she can assert no claim in this regard because the claim was actually presented to her estate and allowed before the statute of limitations had run against anybody.

Section 4087, United States Compiled Statutes (sec. 2103, Rev. Codes), does not apply to contracts generally made by Indians not affecting the matters referred to in the section. It was passed for the particular purpose of protecting Indians from improvident contracts for services in connection with their lands. (*Smith & Steele v. Martin*, 28 Okl. 836,

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115 Pac. 866; *Green v. Menominee Tribe*, 233 U. S. 558, 58 L. Ed. 1093, 34 Sup. Ct. Rep. 706 [see, also, Rose's U. S. Notes]; *Postoak v. Lee*, 46 Okl. 477, 149 Pac. 155.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Louise Stinger died November 25, 1905, and Andrew Stinger, her widower, was appointed and qualified as administrator of her estate. Notice to creditors was given, and time for presentation of claims expired. Within the time limited for presentation of claims, J. M. Keith, as guardian of Eva May Allard and Louise Anna Allard, minors, presented two claims, each in the sum of \$7,000, and based upon a promissory note dated May 10, 1902, payable on demand to J. M. Keith, guardian. These two notes were signed by Louise Stinger, decedent, Charles Allard, Andrew Stinger, and L. J. B. Jette. These claims were allowed by the administrator and approved by the judge of the court. On September 7, 1916, Keith filed a petition praying for an order of the court directing the administrator to pay to him personally these two claims, insisting that for reasons hereinafter stated he had become subrogated to the rights of the estate of the minor children as to the title to the notes and the claims. At that time all other claims had been paid, and there were more than sufficient funds with which to pay these claims. Formal objections, in the nature of answers, were filed to the allowance of this petition by the administrator officially, and also personally, by Leon Bishop, as guardian of the minor children of Louise Stinger, deceased, and by Eva May Allard as an heir at law of Louise Stinger, deceased. These several answers expressly deny the jurisdiction of the district court sitting in probate to grant the relief prayed for in the petition, for the reason that the right of the petitioner depends upon his claim of subrogation, which presents an issue that can be determined only by a court of equity. The answers also raise some issues of fact upon the merits. To these

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answers replies were filed by the petitioner. The matter came on for hearing before the court without a jury, evidence was taken in support of and in opposition to the petition, and decision was rendered by the court denying the petition on the sole ground that it did not have jurisdiction in that proceeding to determine the equitable claim of subrogation upon which plaintiff's petition was founded. A motion for new trial was granted, and appeal has been taken from the order by all the parties filing objections to the petition.

The assignments of error present two questions for determination: First, was a motion for new trial permissible in a probate proceeding of this kind? Second, if motion for new trial was permissible, was the order granting the new trial justified upon the merits?

It is urged by appellants that in a probate case of this kind [1] a motion for new trial will not lie, because the petition was not disposed of by a determination of facts, but was disposed of solely upon a question of law; that a new trial is authorized only for the re-examination of issues of fact, and that in this case, the question involved being only an issue of law, there could not be a re-examination of issues of fact.

A new trial is defined by the Code as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees." (Rev. Codes, sec. 6793.) A new trial may be granted on the application of the party aggrieved for the following causes, among others: (1) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law; (2) error in law occurring at the trial and excepted to by the party making the application. (Rev. Codes, sec. 6794.) Under this statute it is evidently contemplated that a re-examination of the facts may be had when the court is satisfied that an error of law has been committed by reason of misapplication of the law to the facts, for if otherwise, how then could a new trial be granted because of insufficiency of

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the evidence, or because the decision is against law, or on account of error in law occurring at the trial, since these questions are purely law questions? This interpretation of the law has been made in a number of instances involving judgments of the court upon sustaining motion of defendant for nonsuit or motion for directed verdict. In each of these cases the decision is a determination of a question of law, and not a determination of a question of fact, but it has been held uniformly by this court that a motion for a new trial will lie in such cases. (*Old Kentucky Distillery v. Stromberg-Mullins Co.*, 54 Mont. 285, 169 Pac. 734; *St. Paul M. Mfg. Co. v. Bruce*, 54 Mont. 549, 172 Pac. 330; *Nelson v. Northern Pac. Ry. Co.*, 50 Mont. 516, 148 Pac. 388.) The new trial involves a re-examination of the facts with opportunity to make a different application of the law to the facts if the court conceives that it has committed error in its former ruling.

Respondents misinterpret the situation when they contend [2] that there is nothing in this case to review but a question of law. It is true that the court decided the case upon the law point that it did not have jurisdiction to grant the relief prayed for, but whether or not the review is a re-examination of facts does not depend upon the reason given by the court for its decision, but rather upon the question whether or not the pleadings as made present issues of fact. It has been determined by this court that: "While the provisions of the Codes relative to new trials and appeals apply generally to probate proceedings (Rev. Codes, sec. 7712), controversies which do not arise upon written pleadings authorized or required by statute do not fall within them, because a 'new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees' (Rev. Codes, sec. 6793), and an issue of fact for the purpose of a trial arises upon formal pleadings (Rev. Codes, sec. 6723)." (*In re Antonioli's Estate*, 42 Mont. 219, 111 Pac. 1033; *State ex rel. Heinze v. District Court*, 28 Mont.

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227, 72 Pac. 613.) The real question, then, is whether or not [3] an issue of fact is presented in this case upon formal pleadings authorized or required by the statute. If such issue of fact is thus raised, then a motion for new trial will lie; otherwise not.

In the Title of the Code relating to probate proceedings appear the following sections: "The provisions of Part II of this Code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this Title—apply to the proceedings mentioned in this Title." (Rev. Codes, sec. 7712.) "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of Article II, Chapter II, of this Title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise, by the court or judge, as in civil actions." (Sec. 7714.) "If no jury is demanded, the court or judge must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court or judge, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either party may move for a new trial, upon the same grounds and errors, and in like manner, as provided in this Code for civil actions. * * *

(Sec. 7715.) Article II, Chapter II, referred to in section 7714, deals with contests of wills, and therefore, under this section, issues of fact must be tried in conformity with the requirements of the Code as to the contest of wills. This applies to all issues of fact joined in probate proceedings. If no jury is demanded, the court or judge must try the issues joined, and either party may move for a new trial upon the same grounds and errors, and in like manner as provided in the Code for civil actions. In this case, issues of fact were

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joined by formal pleadings consisting of the petition by Keith, the answers of the appellants and the reply by Keith. While not denominated complaint, answer, and reply, respectively, as in the trial of the ordinary civil action, nevertheless the pleadings are just as formal and just as effectual in presenting the issues of fact involved therein. The clear meaning of the probate statutes is that, when formal pleadings are filed presenting issues of fact, the parties should proceed to a formal trial, and, upon the determination of the issues of fact by the court, the aggrieved party may move for a new trial the same as in other cases.

Appellants contend that, by reason of the decisions of this court in the cases of *In re Antonioli's Estate* and *State ex rel. Heinze v. District Court, supra*, motion for new trial cannot be made in probate proceedings. In the former case two applications for letters of administration were heard together and issue was not joined in formal pleadings as to any fact alleged in either petition. Under these circumstances, the case would not come within the rule as to issues being embodied within formal pleadings, and therefore is not in point. In the latter case, action was brought to compel relator to pay to a receiver the amount of allowances granted to him in an order allowing his final account as receiver. The court entered an order against the relator for the payment of these allowances. There was no issue of fact arising upon formal pleadings, and the court held that a motion which does not ask for a decision of an issue of fact arising upon formal pleadings is not the subject of a motion for new trial. Neither of the cases is inconsistent with the contention here that a motion for a new trial will lie by reason of the fact that there were formal pleadings presenting issues of fact.

This court had occasion to pass upon this question in *In re Davis' Estate*, 27 Mont. 235, 70 Pac. 721. After quoting the sections of the Code relative to trials of issues of fact in probate proceedings above set forth, it stated that: "Contests of this kind must be conducted with the formalities and pro-

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cedure applicable to ordinary actions, with the aid of all the court machinery necessary for that purpose. If this is the correct theory—and we think it is—then, whenever an issue of fact is made, and the trial is had in the ordinary way, a motion for a new trial will lie, and a re-examination of the issues may be had. ‘It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises, which, after its decision, may be re-examined by the court upon a motion for a new trial.’ (*In re Bauquier’s Estate*, 88 Cal. 302, 26 Pac. 178; 532.)”

As a motion for a new trial in civil actions can be made upon the ground of the insufficiency of the evidence to sustain the verdict or judgment that the decision is against the law, and that errors in law occurred upon the trial, so in probate proceedings, where issues have been joined in formal pleadings, motion for new trial can be made upon these grounds. As these were the grounds assigned for a new trial in the motion in this case, respondents were within their rights in making such a motion.

Appellants insist that the claims as filed were not in [4, 5] compliance with the statute requiring verification by the creditor or someone in his behalf. The claims were identical in form, and therefore a consideration of the one filed as guardian of Eva May Allard, minor, will dispose of both of them. The claim on its face purported to be the claim of J. M. Keith, guardian of Eva May Allard. The verification was made by John M. Keith without any reference whatever to his official capacity as guardian. It is contended that, if this was intended as the presentation of the claim of the minor, it was insufficient, because it does not purport to be

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presented as such, contains no allegation that she is a creditor or claimant, and contains no affidavit or verification by her or purported to be made in her behalf. The requirement of the statute as to the affidavit is as follows: "Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or someone in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. * * * " (Sec. 7526, Rev. Codes.)

The verification, omitting the caption, was in the following form:

"John M. Keith, whose foregoing claim is herewith presented to the administrator of said deceased, being duly sworn, says: That the amount thereof, to wit, the sum of eight thousand four hundred sixty-two and 50/100 (\$8,462.50) dollars is justly due to said claimant; that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of said affiant.

"[Signed] J. M. KEITH.

"Subscribed and sworn to before me this 10th day of September, 1907.

"HENRY C. STIFF,

"Notary Public in and for Missoula County, Montana."

Presumably a minor may be incompetent to make an affidavit, and in such event there must be someone authorized to make an affidavit in his own behalf. It is hardly open to dispute that in such case the guardian is the proper person to make such affidavit. (2 C. J. 321, par. 16.) As the guardian is the representative of the estate, a claim made by him as such guardian is presumably in behalf of the estate. By this verification it appears that John M. Keith is the identical person referred to as J. M. Keith, guardian, but the affidavit is an individual affidavit. However, we cannot understand that there can be any distinction between an affi-

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davit made by a person as a guardian and another as an individual covering identically the same subject matter in identically the same form. If there is, it is a distinction without a difference. In either case, it is the individual that is making the oath, and it is the individual that is responsible for any false statements contained therein, and who is liable for prosecution for perjury if perjury has been committed. (*Wade v. Roberts*, 53 Ga. 26.) We are therefore of the opinion that the point made by the appellants that the affidavit is insufficient in the respects mentioned is not well taken.

Objection is also made to the affidavit for the reason that the [6] seal of the notary public was not affixed to the jurat. However, it appears that, at the time the affidavit was made, the present statute requiring the notary public to affix his seal to authenticate his official acts had not been enacted then, and that the provisions of the law in force did not require him to authenticate with his official seal an affidavit to be used in this state in any of its courts, or in any manner whatever. (Rev. Codes, sec. 320, subd. 6.)

Appellants insist that the trial court, sitting as a court in [7] probate, had no jurisdiction to grant the relief prayed for in the petition, for the reason that petitioner relies upon the claim of subrogation to the rights of his former wards, that the right of subrogation is equitable in its nature, and that such equitable right cannot be determined in a probate proceeding, but can be determined only in a proceeding in equity. This contention is based upon a line of decisions consistently holding that the district court sitting as a probate court is of limited jurisdiction, and that its powers are only those which are expressly granted by the statute or necessarily implied to give effect to those expressly granted. It is uniformly held that such power does not confer jurisdiction generally to entertain proceedings to determine equitable questions, but that such cases must be brought in the district court exercising such equitable jurisdiction. It is conceded by all parties to this case that such is the general rule, but

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respondent contends that there exists a well-defined exception to that rule to the extent that it may become necessary for the probate court to determine an equitable question as a necessary incident to the carrying out of the powers expressly granted to the probate court.

In support of appellants' contention, a number of Montana cases are cited, but each one of them may be distinguished from the case under consideration. In the case of *Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385, an action was brought in the probate court for construction of a will. This proceeding was brought independently of any other proceeding in the administration of the estate, and therefore the jurisdiction to hear the petition depended upon whether or not the power to construe a will was expressly granted by the statute. It was held that the court did not have jurisdiction to entertain such an action. In *In re Dolenty's Estate*, 53 Mont. 33, 161 Pac. 524, it was held that the probate court did not have jurisdiction to determine the question of title as to real estate between the estate and the widow of the deceased claiming the real estate adversely. In *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82, it was held that the probate court was not empowered, under the statute as it then existed, to authorize a guardian to mortgage the real estate of his ward. In *State ex rel. Bartlett v. District Court*, 18 Mont. 481, 46 Pac. 259, it was held that a special administrator had no authority other than to collect and preserve the estate, and did not have any authority to pay claims. In *State ex rel. Eisenhower v. District Court*, 54 Mont. 172, 168 Pac. 522, it was held that the probate court has no authority to allow a fee to an attorney for services rendered the administrator in the settlement of the estate, but that the matter of attorney fee was a question between the administrator and the attorney, and that the only function of the court in regard to it was the allowance or disallowance to the administrator of an attorney fee paid for which the credit is claimed in the administrator's final account. In *In re Higgins' Estate*, 15 Mont. 474, 28 L. R. A. 116,

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39 Pac. 506, there is a general discussion of the limitation of the jurisdiction of the probate court, but it does not decide any specific point material to the determination of this case. It is to be noted that in each one of the cited cases the jurisdiction of a probate court was denied, for the reason that in each case the relief sought was not included within the express powers granted the probate court, nor was it necessarily incidental to the exercise of such expressly granted powers.

The real question to be determined here is whether or not [8] the power to make determination of the right of the petitioner to subrogation was necessarily implied from the fact that the court, in the exercise of its probate jurisdiction, does have express authority to direct the payment of claims. As a general proposition, a court must necessarily have power to hear and determine all questions of law which are necessary to an ultimate decision of the issues involved. (Ross on Probate Law and Practice, 217.) In California the probate statutes are substantially the same as our own, and in that state a number of decisions have been handed down illustrating the right of the probate court to consider matters equitable in nature, the determination of which becomes necessary in the exercise of the powers expressly granted. In the case of *In re Clary*, 112 Cal. 292, 44 Pac. 569, it was held that after a decree of distribution the probate court had jurisdiction to compel an accounting from the executor to one of the heirs. In the case of *Estate of Burton*, 93 Cal. 459, 29 Pac. 36, the question arose as to whether or not the purchaser of the rights of an heir to land before distribution could maintain his petition in the probate court for determination of his title, and for an order assigning to him the share of his vendor. An excerpt from the opinion in that case sets forth concisely the theory upon which such jurisdiction is vested, as follows: "It will not be denied that the decree of distribution and the order discharging the executor or administrator are within the scope of 'matters of probate,' in the sense of the

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Constitution, from which it necessarily follows that the court must have the incidental power, in some mode, to ascertain and determine who are entitled, as distributees, to the residue of the estate, even though such determination should involve a question as to title or possession of real property." In *In re Warner's Estate*, 6 Cal. App. 361, 92 Pac. 191, it was held that, in a contest on a petition for appointment of administrator, the probate court had jurisdiction to determine the validity of an antenuptial contract which was involved, it being claimed that the contract was void because of fraud. In the case of *In re Cummin's Estate*, 143 Cal. 525, 77 Pac. 479, it was held that the assignee of an allowed creditor's claim may petition the probate court for payment thereof to himself. This involved, of course, the validity of the assignment which is not within the general powers of the probate court to determine, but it was held to be within its jurisdiction inasmuch as that was incidental to the power of the court to order the payment of the claim. That case, in principle, is very similar to the one at bar. Other states have gone even further than the California courts in holding that the probate court has jurisdiction to determine equitable questions where necessary to the proper disposition of its probate business. (*Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Hayden v. Hargan*, 202 Ill. App. 544; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234.) This court, in considering the right of the contestants of a will to share in the estate, sets forth in general terms the jurisdiction of the probate court to dispose of questions necessarily incidental to the exercise of the powers expressly conferred, in pertinent language as follows: "This argument proceeds upon the theory that, though the district court is one of general jurisdiction, yet, when exercising its probate jurisdiction, its powers are limited by the statute from which they are derived, and unless express authority can be found in the statute for the particular order, or part of it, which is called in question, it is void, citing *State ex rel. Bartlett v.*

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District Court, 18 Mont. 481, 46 Pac. 259; *State ex rel. Shields v. District Court*, 24 Mont. 1, 60 Pac. 489; *Burns v. Smith*, 21 Mont. 252, 69 Am. St. Rep. 653, 53 Pac. 742; and *State ex rel. Kelly v. District Court*, 25 Mont. 33, 63 Pac. 717. Speaking generally, the soundness of this proposition is not controverted. The foregoing cases fully support it; but they are not inconsistent with another proposition of equal weight and importance: that, though the jurisdiction of the court when exercising its probate powers is, in a sense, special and limited, and depends upon the statute, yet, by implication, it also possesses all powers incidentally necessary to an effective exercise of the powers expressly conferred. This must be the case. Otherwise the court would be unable to discharge its very important functions. Touching its powers in respect of executors and administrators, the proper function of the court is the control of the devolution of property upon the death of its owner. All questions of law and fact which necessarily arise from the inception of the proceeding down to and including the distribution of the property must necessarily fall within the purview of this power of control." (*Estate of Davis*, 27 Mont. 490, 71 Pac. 757.)

Applying the principles of the decisions hereinbefore referred to to the case under consideration, can it be said that the determination of the question whether or not Keith was subrogated to the rights of his former wards in the matter of the claims in question could be had in a probate proceeding upon his petition for an order directing payment of these claims to himself? Under the probate statutes, there can be no question whatever but that it is within the jurisdiction of the probate court, in the course of administration, to direct the payment of claims that have been allowed against the estate. It is certain that it cannot direct the payment of an allowed claim unless it is advised as to whom the payment of that claim should be made. If there is no dispute as to the title of the claim as between the one to whom it is allowed and the one who asks for its payment, as in this case, it would

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seem to this court that there could be no question but that the court could, in the exercise of its granted powers, determine that the claim should be paid to the one claiming title thereto. In case there is a substantial dispute between two or more claimants as to the title, a different question would be presented, which we do not decide at this time. In this case, the probate court would be within its jurisdiction in determining whether or not Keith was subrogated to the rights of its former wards and entitled to an order directing payment of the claims to him.

It is urged by appellants that the determination of this [9] question in the probate proceeding prevents a hearing on the equitable defenses that might be made to his claim of subrogation. As between Keith and the estate, there could be no equitable defenses because the obligations were unequivocal promissory notes which had been allowed by the administrator and approved by the judge; the consideration for the notes was undisputed, and the obligation of the makers of the notes unquestioned. There could be no equities as between the former wards and Keith, because there had been a full and complete settlement between him and them, as hereinafter set forth, whereby they had received everything from him that under the decree of the court they were entitled to receive, by which settlement all their interest in the notes was necessarily extinguished.

Appellants also urge that Keith should not be entitled to [10] recover in this proceeding because of laches consisting of his failure to make more prompt settlement of his guardianship accounts, and also to take action sooner in the court to have his claim paid. His delays in settlement of his guardianship accounts are immaterial as between him and the estate of the deceased, and even though there may have been unreasonable and inexcusable delays in his accounting as guardian, yet, a full and complete settlement having been made by him with his former wards, it must be held that such settlement is a satisfaction of all his obligations to them.

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So far as any laches in taking action in the court to have his claim paid is concerned, we are unable to see wherein the obligation rested upon him to take such action at all. The obligation to settle the estate and pay the claims rested upon the administrator, and while the owner of the claim may take action to expedite payment of his claim where there has been unreasonable delay in the administration, yet that is not obligatory upon him, but he has a right to assume that the administrator will pay claims in the due course of administration when the estate is in a condition for such payment.

Appellants also contend that Keith was not entitled to [11] subrogation on the merits. The facts are undisputed that Keith, as guardian of his former wards from whose funds he made the loans evidenced by the promissory notes, made full and complete settlement with his wards, turning over to them cash in lieu of these notes. By that settlement the wards received all moneys and property which they were entitled to receive from him as guardian, and therefore it is inconceivable that they could have any further interest in or claim to the notes. They cannot receive from their former guardian cash in lieu of the notes and at the same time claim the notes. Their claim to the notes was extinguished by the payment to them of the money for which the notes were given. Such settlement, however, did not destroy the notes nor extinguish the claim that had been allowed against the estate of the deceased. The estate could have no interest or concern in the ownership of the notes, for it could make no difference to it to whom the payment was made, provided, however, that it did not make payment to the wrong person, and thereby incur the danger of being obliged to pay the claims twice. The interest of the minors was extinguished, and the notes were still in full force and effect as against the makers thereof. The title must have been lodged in someone, and under the circumstances no one could have any interest in them except Keith, who had turned over to his wards money instead of the notes upon the latter being rejected by

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them. If he had been required to surrender the notes to the wards after having made settlement with them, they would have received the \$15,000 with interest twice, while he would have been compelled to make payment of that amount twice, which, from any standpoint, would be unjust and inequitable. The principle of subrogation is intended to relieve against just such inequities as this would be. Upon making payment to his wards of cash in lieu of the notes representing money of his wards which he had loaned, he was entitled to an assignment to him of the notes, but the assignment was not made. The law, by the rule of subrogation, supplies the defect, and, in principle, says that, even though a formal assignment was not made, yet, as in equity and good conscience the law will not permit one party to be benefited by a double exaction, so will it not require the other party to suffer the penalty of double exaction. It will treat the transaction the same as though that was done which should have been done, and hold that Keith shall, by the right of subrogation, be held to be the owner of the notes.

Appellants urge that subrogation should not be allowed [12] in this case because Keith made an unwarranted investment of his wards' funds by loaning them to individuals without an order of the court, and was compelled to account for such funds, and therefore does not come into court with clean hands. They cite several cases to that effect, but those cases seem to be based upon the principle that one acting in a fiduciary relation, making unwarranted investment of the funds of the beneficiary, cannot reap a profit by reason of his wrongdoing or place himself in a more advantageous position by reason of his perpetration of a fraud. (*Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 25; *Bank v. United States*, 148 U. S. 573, 37 L. Ed. 564, 13 Sup. Ct. Rep. 702 [see, also, *Rose's U. S. Notes*]; *Guckenheimer v. Angevine*, 81 N. Y. 395; *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 293.) But no one of these cases goes to the extent of holding that such a person would not have an interest in the unwar-

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ranted investment to the extent of reimbursement for moneys expended by him in accounting therefor. We believe the general rule to be that when one acting in a representative or fiduciary capacity uses his own funds to satisfy an obligation for the benefit of his trust, he is subrogated to the rights of his principal against others primarily liable, and that such general rule is applicable in this case. (37 Cyc. 439, 440, 442; *Smith v. Moore*, 109 S. C. 196, 95 S. E. 351; *Franzell v. Franzell*, 153 Ky. 171, 154 S. W. 912; *Buskirk v. Sanders*, 70 W. Va. 363, 73 S. E. 937; *Flowers v. Reece*, 92 Ark. 611, 123 S. W. 773; *Earle v. Coberly*, 65 W. Va. 163, 17 Ann. Cas. 479, 64 S. E. 628.)

It is urged that the claim should not be allowed for the [13] reason that the deceased was, at the time of signing the notes, an Indian and a ward of the government, and that, as such, she could not bind herself to pay the notes unless they were executed and approved in accordance with the requirements of the United States Compiled Statutes of 1916, section 4087, reading as follows:

“No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

“First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

“Second. It shall be executed before a judge of a court of record, and bear the approval of the secretary of the interior and commissioner of Indian affairs indorsed upon it.

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“Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

“Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

“Fifth. It shall have a fixed limited time to run which shall be distinctly stated.

“Sixth. The judge before whom such contract or agreement is executed shall certify officially the time when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

“All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the treasury for the use of the Indian or tribe by or for whom it was so paid.”

It is unquestioned that the notes were not executed and approved in accordance with the requirements of this statute,

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and appellants insist that by reason thereof they were absolutely void and nonenforceable. It is to be noted that the statute limits the kind of contracts to be executed by Indians to contracts which must be executed and approved in accordance with the statute, namely: Contracts involving "services for said Indians relative to their lands, or to any claims growing out of, or in reference to annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States." Appellants have cited a number of cases in support of their contention, but it is sufficient to say that in each one of the cited cases it appears that the contract involved was one relating to some one of the matters above set forth. In the case at bar the notes had nothing whatever to do with any of the items mentioned in this statute.

In the case of *Postoak v. Lee*, 46 Okl. 477, 149 Pac. 155, the court gives what we conceive to be a proper interpretation of this statute, in the following language: "It is, however, contended by the plaintiff in error that Jack Postoak had no right to enter into this contract because he was a full-blood Mississippi Choctaw Indian. This contention is not well taken. The fact that one of the parties to the contract was a full-blood Indian did not incapacitate him or impair his right to enter into this contract. He had the same right as other persons to make contracts generally. The only restriction on this right peculiar to an Indian, was in regard to contracts affecting his allotment. These he could not make without the consent and approval provided by law. The contract above set out was not within the restricted class." There can be no question but that Indians, unless prohibited by this [14] statute, may make valid contracts (22 Cyc. 115.) In our opinion, this statute is insufficient to reach a case such as this (*Smith & Steele v. Martin*, 28 Okl. 836, 115 Pac. 866; *Green v. Tribe*, 233 U. S. 588, 58 L. Ed. 1093, 34 Sup. Ct. Rep. 706 [see, also, Rose's U. S. Notes]), and therefore it must be

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held that, even though Louise Stinger was an Indian and a ward of the government, yet she had the right to sign a promissory note such as the ones in question which did not involve the property rights mentioned in the cited statute.

It is also urged that this claim cannot be allowed against [15] the estate for the reason that deceased was merely an accommodation maker, and that the principal debtor was released by Keith's failure to bring action against him within the time limited by the statute of limitations. It is undisputed that she did not sign on the back of the note as an indorser, but that she signed the note on its face as a maker, the same as the others. The evidence is contradictory as to whether or not she was an accommodation maker, but that is immaterial. She was one of the makers of the note, and she was primarily liable for its payment, even though an accommodation maker.

The fact that the statute of limitations was allowed to run [16] as against Louise Stinger's co-makers did not prejudice her or her estate any, as her or its right to reimbursement from the principal debtor does not depend on that fact. The limitation of any action by her or it against the principal debtor would commence to run from the date that she or it paid the notes, and not before. (Spencer on Suretyship, pars. 119, 122, 124, 154, 155, 165; *Oppman v. Steinbrenner*, 17 Mont. 369, 42 Pac. 1015; *Northwestern Nat. Bank v. Opera House Co.*, 23 Mont. 1, 57 Pac. 440.)

The order granting the motion for new trial is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GAIEN concur.

BOWERS, RESPONDENT, v. CHICAGO, MILWAUKEE &
ST. PAUL RY. CO., APPELLANT.

(No. 4,485.)

(Submitted September 24, 1921. Decided October 26, 1921.)

[201 Pac. 825.]

*Railroads—Highways—Fences—Station Grounds—Injury to
Livestock.*

Railroads—Highway Crossings—Cattle-guards—Wing Fences.

1. Section 4308, Revised Codes, making it incumbent upon railroads to maintain good and legal fences on both sides of their track and property, impliedly excepts highway crossings, at which, however, they must install cattle-guards made effective by wing fences on both sides of the highway.

Same—Station Grounds—Fences not Required.

2. Railroad tracks at depot and station grounds where passengers and freight are received and discharged, where employees are required to pass continuously back and forth, and where public convenience requires free and unobstructed access, are impliedly excepted from the requirement of fencing made by section 4308, Revised Codes.

Same—Fences at Station Grounds—Presumptions.

3. Where a railroad company chooses to fence its station grounds, though not required to do so, no presumption may be indulged against it because of the location and character of the fences if they meet all legal requirements as to their sufficiency.

Same—Injury to Livestock at Fenced Station Grounds—Absence of Negligence—Nonliability.

4. In the absence of willfulness or negligence in handling their trains, railroad companies are not liable for injuring or killing livestock which stray into their depot or station grounds; hence where it was conceded by plaintiff that defendant company's locomotive engineer was not negligent in the handling of the train which killed a horse for which damages were sought, plaintiff was not entitled to recover.

Same—Fences at Station Grounds Forming Trap—Evidence—Insufficiency.

5. Where there was a space on either side of the track, which had been fenced by defendant company though not required to do so, affording ample space for plaintiff's horse to keep out of the way of defendant's train, the contention that the fences created a trap from which the animal could not escape, *held* untenable in the absence of evidence showing that the fences constituted a trap or cul-de-sac.

Appeal from District Court, Musselshell County; George P. Jones, Judge.

2. Depot or station grounds as within purview of statute requiring railroad to fence tracks, see notes in 11 Ann. Cas. 20; Ann. Cas. 1912D, 628; 7 L. R. A. (n. s.) 203.

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ACTION by J. W. Bowers against the Chicago, Milwaukee & St. Paul Railway Company, a corporation. Judgment for plaintiff and defendant appeals. Reversed.

Mr. Thomas J. Mathews, for Appellant, submitted a brief; *Mr. A. N. Whitlock*, of Counsel, argued the cause orally.

In suits for damages on account of injury to animals on railroad tracks, the place where the animal came upon the track is nearly always a controlling element in determining the liability of the company. (3 Elliott on Railroads, p. 453.)

The general rule is that if the animal came upon the track at a place where the company was exempt from fencing, there can be no liability unless the injury was willfully or negligently inflicted. (*Jeffersonville etc. R. Co. v. Huber*, 42 Ind. 173; *Peoria etc. R. Co. v. Barton*, 80 Ill. 72; *Wier v. St. Louis etc. R. Co.*, 48 Mo. 558; *Bremmer v. Greenbay etc. R. Co.*, 61 Wis. 114, 20 N. W. 687; *Schneir v. Chicago etc. R. Co.*, 40 Iowa, 337; *Asher v. St. Louis etc. R. Co.*, 79 Mo. 432.) In this case the testimony shows that the mare came on to the depot grounds where the section-house is located, and where no fence was required. The condition of the fence at the actual place of entry is the test for determining the company's liability. (3 Elliott on Railroads, p. 453, and cases cited under note 209.)

Section 4308 of the Revised Codes provides with reference to the building of fences and cattle-guards; but it could not have been the intention of the legislature to require railroad companies to fence on both sides of their depot grounds in cities and villages through which the road passes; and ordinarily the railroad companies are not so required. Railroad companies are not required to fence their tracks at their depots and about their station grounds. Where passengers and freight are received and discharged, public convenience requires that there should be unobstructed access to the buildings and tracks, and, therefore, fences are not required.

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(3 Elliott on Railroads, p. 438; *Scheekloth v. Chicago etc. R. Co.*, 108 Mich. 1, 65 N. W. 663; *Bechdolt v. Grand Rapids etc. R. Co.*, 113 Ind. 343, 15 N. E. 686; *Galena etc. R. Co. v. Griffin*, 31 Ill. 303; *Atchison etc. R. Co. v. Shaft*, 33 Kan. 521, 6 Pac. 908; *Kobe v. Northern Pac. R. Co.*, 36 Minn. 518, 32 N. W. 783; *Acord v. St. Louis etc. R. Co.*, 113 Mo. App. 84, 87 S. W. 537; *Flagg v. Chicago etc. R. Co.*, 96 Mich. 30, 21 L. R. A. 835, 55 N. W. 444.)

The company not being required to maintain fences at its station grounds, it follows that it will not be liable for stock injured by reason of the absence of such fences, unless the company was guilty of negligence in handling the train which causes the injury. (3 Elliott on Railroads, p. 438.)

Mr. J. P. Healy, for Respondent, submitted a brief and argued the cause orally.

Section 4308 of the Revised Codes of Montana provides that appellant is required to "make and maintain a good and legal fence on both sides of their track and property, and maintain at all crossings cattle-guards, over which cattle or other domestic animals cannot pass"; and "In case they do not make and maintain such fence and guards, if their engines or cars shall kill or maim any cattle or other domestic animals upon their line of road, they must pay to the owner of such cattle or other domestic animals, in all cases, a fair market price for the same, unless it occurred through the neglect or fault of the animal so killed or maimed. * * *

In this case there were no cattle-guards at all, and the fence on the north side extended from the eastward down to within three feet of the stockyards, and on the south side, from the eastward down past the station-house, except for a gap of little over one hundred feet located a few feet east of the said station-house, thus creating a closed lane, trap, or "cul-de-sac," open only at the west end, near the station-house, and closed at the east end by the long expanse of track,

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fenced on both sides, "into which animals are liable to wander and become injured." (33 Cyc. 1200, note 17; *Ft. Wayne etc. Ry. Co. v. Herbold*, 99 Ind. 91; *Louisville etc. Ry. Co. v. Porter*, 97 Ind. 267; *Indianapolis etc. Ry. Co. v. Bonnell*, 42 Ind. 539.) In *Carrollton Short Line Ry. Co. v. Lipsey*, 150 Ala. 570, 43 South. 836, the court said: "The cattle-guard must be so constructed as not to be a trap or snare to stock. It should be so constructed that the stock could easily see the danger of attempting to cross it, so that under ordinary circumstances an animal would not undertake to cross it." Also: "A railway company will be liable for the injury to stock occasioned by its maintaining a barbed wire fence on or along its right of way, if it is so negligently constructed as to be a source of danger to the stock." (33 Cyc. 1163; *Winkler v. Carolina etc. Ry. Co.*, 126 N. C. 370, 78 Am. St. Rep. 663, 35 S. E. 621.)

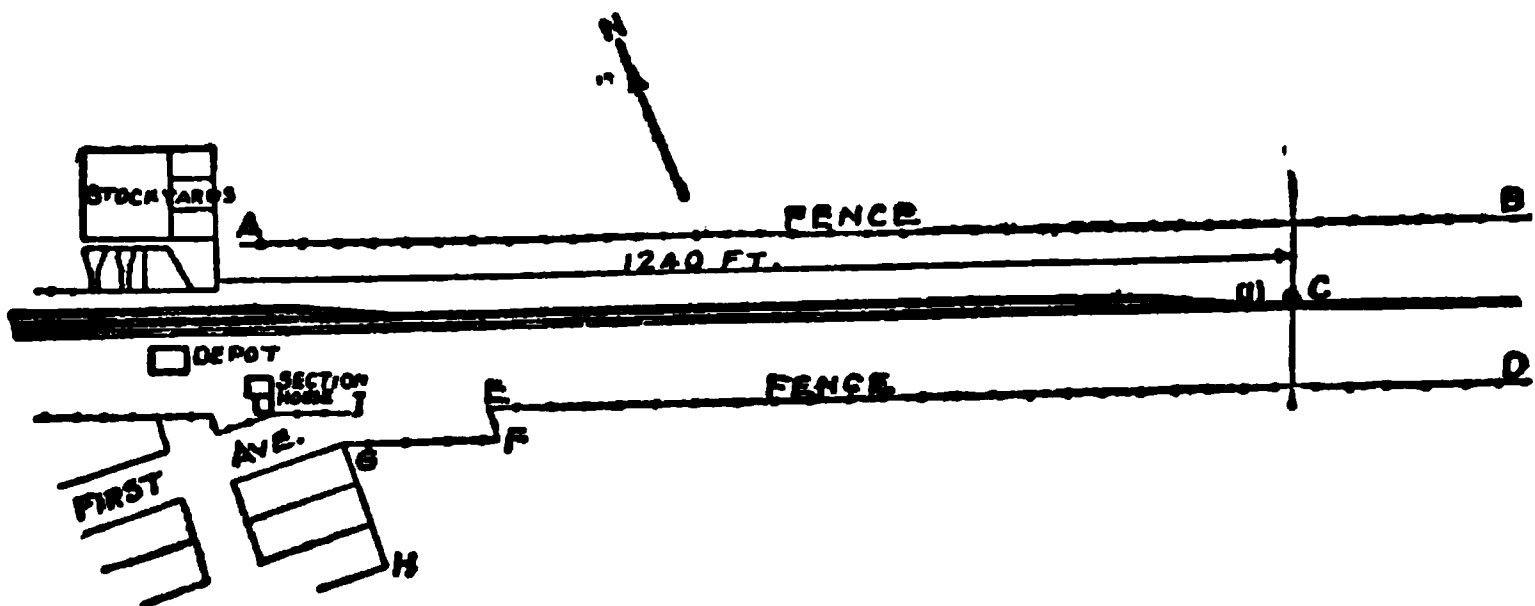
MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

A mare belonging to plaintiff, which had strayed into the station grounds of defendant at Bascom, Montana, was run down by a freight train and fatally injured, so that it was necessary to kill her. Plaintiff commenced this action to recover damages for the loss he thus sustained. After issues had been made up, the parties submitted the cause for judgment upon an agreed statement of facts. The court concluded that the defendant was liable and rendered judgment for the plaintiff for \$200, the amount which it was agreed the mare was worth, with interest at 8 per cent per annum from the date of the commencement of the action. Defendant has appealed.

To make clear a statement of the facts so far as they are material to present the question submitted for decision, we reproduce a plat of defendant's station grounds and a portion of the town site of the village of Bascom, which we find

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incorporated in the record. For convenience we shall note the directions as north, south, east, and west.



The station buildings are designated as the depot and section-house on the south side of the tracks, and the stockyards on the north side. The station grounds to the east of these buildings are inclosed on the north and south by wire fences, indicated by the notched lines parallel to the tracks at a distance of 100 feet on either side of the main track. This is the track nearest the depot building. These fences are referred to in the statement as legal fences, that is, such as comply with the statute imposing upon railway companies the duty to fence their tracks and property.

As indicated on the plat, the station grounds are fenced toward the west from point I, on First Avenue in the town site, and from the stockyards on the north. The only means of access into the station grounds are a narrow passway through the fence on the north at the stockyards at A, not protected by a gate, and the gap in the fence on the south side at First Avenue, indicated by the letters G I. So far as the statement discloses anything on the subject, the portion of the town site appearing on the plat is unoccupied. The area to the east of this and beyond the fence south of the tracks is an inclosed pasture belonging to the plaintiff, the west boundary line being the fence G H, extended south. On August 22, 1915, the day before the accident, the mare in question was in the pasture. During the following night she,

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with other animals, strayed out of the pasture and into the station grounds by way of First Avenue through the gap at First Avenue, and east along the tracks to a point near the switch at C. Several trains of the defendant do not stop at Bascom, among these being the west-bound freight No. 63. About 3 o'clock in the morning of August 23, train No. 63, consisting of forty-five cars and a caboose, driven by defendant's engineer, Harper, was approaching the station from the east at a speed of twenty miles per hour. The grade at this point is from two to three per cent downward toward the west. When the engine was about twelve car-lengths east of the point marked (1), the engineer discovered two horses on the track. He immediately applied the emergency brakes, sounded the engine whistle, opened its cylinder cocks, allowing the steam to escape, in order to frighten the horses from the track, and did everything in his power to stop his train. These horses moved off the track to the south, but were immediately followed by five others, stringing along one after the other across the track, among them the mare in question. She was the last one of the string, and was struck by the engine.

Counsel for defendant contends that the admitted facts are insufficient to show that the defendant is liable for plaintiff's loss. His argument is that in such cases the point at which an animal strays upon a railway track is a controlling element in determining the liability of the company for injury to it; that, though the statute makes a general requirement that railway companies shall fence their tracks and property, an exception must necessarily be made of depot and station grounds, including a way of access to them; and that since it is conceded that the engineer did everything in his power to prevent his train from running the mare down, and was not negligent in handling it, the defendant is not liable because the mare had strayed into the station grounds, which the company was not required to fence, and was there without defendant's fault.

Counsel for plaintiff, conceding that the engineer was not negligent in handling his train, and that defendant is not liable on that ground, contends that the location of the fences from First Avenue east from the narrow gap at that point constituted that part of the station grounds a cul-de-sac, or trap, rendering it impossible for animals straying into it to escape from trains approaching from either direction, and hence that the defendant is liable for this reason. In other words, it was incumbent upon it either to have maintained wing fences and a cattle-guard immediately east of the gap at First Avenue to prevent animals from straying toward the east, or, in the alternative, to have omitted to maintain any fences in this direction at all.

Section 4308, Revised Codes, declares: "Railroad corporations must make and maintain a good and legal fence on both sides of their track and property, and maintain, at all crossings, cattle-guards over which cattle or other domestic animals cannot pass. In case they do not make and maintain such fence and guards, if their engines or cars shall kill or maim any cattle or other domestic animals upon their line of road, they must pay to the owner of such cattle or other domestic animals, in all cases, a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Provided, that nothing herein shall be construed so as to prevent any person, or persons, from recovering damages from any railroad corporation for its negligent killing or injury to any cattle, or other domestic animals, at spurs, sidings, Y's, crossings and turntables."

While the statute is general in its terms and includes all [1, 2] the property of railway companies, it not only impliedly recognizes an exception of public highway crossings, but the necessities of the case, as well as other provisions of law, forbid the maintenance of fences transecting highways. In requiring the installment of cattle-guards at crossings, it implies that they must be effective to keep animals off the

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track, and this requires the maintenance of wing fences on both sides of the highway. The nature of the business of railways and the relation it bears to the public, implies a further exception of tracks at depots and in the station grounds where passengers and freight are received and discharged, and public convenience requires free and unobstructed access to the station buildings and tracks. There must be included, also, space sufficient to afford reasonable convenience in the switching of cars, the making up of trains and supplying engines with fuel and water. Further, employees are required to pass almost continuously back and forth along the tracks in the station grounds in the performance of their duties. That these must be left open and free from obstruction is founded upon the danger which would necessarily result to employees were wing fences or cattle-guards or other similar obstructions maintained in the station grounds. Their freedom from danger while the employees are performing their duties is more important than the safety which such obstructions would afford to straying animals. These several exceptions are recognized by the courts and text-writers generally, and grow out of the very necessities of the case. (3 Elliott on Railroads, sec. 1194; *Knop v. Chicago, M. & St. Paul Ry. Co.*, 57 Mont. 288, 187 Pac. 1020, and authorities cited.)

The proviso in the latter part of the section seems to imply still another exception, but as it is not pertinent to the case in hand, we do not stop to determine its application.

It will be noticed that railway companies are neither [3, 4] expressly nor impliedly excused from exercising ordinary care to avoid killing animals which stray into their depot station grounds. Their liability in such cases depends upon whether they appear to have been guilty of negligence in handling their trains, just as their liability arises at public crossings and other places at which fences are not required to be maintained. In such cases, the fact of killing or injury being proved, the presumption established by section 4309

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prevails, and the burden is upon them to rebut it. No presumption may be indulged against a company, however, because of the location and character of the fences it maintains about its station grounds, if it chooses to fence them, or at any other place where it is not required to do so, if the fences meet all requirements as to their sufficiency. As pointed out by Mr. Elliott in his work on Railroads, if an animal has entered upon the property of a railway company at a point where no fence is required and is injured at a point where none is required, or even at a place where one is required, there is generally no liability, in the absence of willfulness or negligence. (3 Elliott on Railroads, sec. 1201.)

No fence was required, either at the place where the mare [5] in question gained entrance or at the point where she was injured. The contention made by plaintiff is that the fences along the tracks to the east created a trap from which the mare could not escape. In fact, there was a space on either side of the track at the point where she was injured, and there was ample room for her to keep out of the way of defendant's train. In the absence of evidence tending to show that the fences constituted a trap, there is no presumption that they did.

It being conceded that the engineer, Harper, was not negligent in the handling of his train, the facts are not sufficient to justify the conclusion that the defendant was at fault. The judgment must therefore be reversed. It is so ordered.

Reversed.

ASSOCIATE JUSTICES REYNOLDS, COOPER, HOLLOWAY and GALEN concur.

FIRST NATIONAL BANK OF REEDER, NORTH
DAKOTA, APPELLANT, v. MIDDLETON, SHERIFF,
ET AL., RESPONDENTS.

(No. 4,454.)

(Submitted September 20, 1921. Decided October 27, 1921.)

[201 Pac. 683.]

*Claim and Delivery—Judgment—General Verdict—Sufficiency
—Suretyship—Hearsay Testimony—Curing Error.*

Claim and Delivery—Judgment—General Verdict—Sufficiency.

1. In an action in claim and delivery by the mortgagee of animals against the sheriff who seized them on execution, where there was no dispute as to their value, a general verdict was sufficient to support a judgment for their return or a recovery of their value on the bond given by the mortgagee.

Same—Judgment Against Sureties on Bond—Error.

2. In an action in claim and delivery the property involved in which had been delivered to plaintiff on furnishing the bond required by law, a judgment for defendant sheriff ordering execution against the sureties on the bond, though not before the court, was unwarranted.

Appeal and Error—Error in Admission of Hearsay not Cured by Same Evidence on Cross-examination.

3. Where plaintiff had ineffectually objected to the introduction of patently improper hearsay testimony, saving an exception, the fact that on cross-examination of the witness he elicited a repetition of the statement did not cure the error in admitting it in the first instance or constitute a waiver of his right to urge the error.

Appeals from District Court, Custer County, in the Sixteenth Judicial District; Roy E. Ayers, a Judge of the Tenth District, presiding.

ACTION by the First National Bank of Reeder, North Dakota, against A. B. Middleton, Sheriff of Custer County, Montana, and another. From the judgment for defendants and an order denying a new trial, plaintiff appeals. Reversed and remanded.

Cause submitted on briefs of Counsel.

2. Judgment against principal in replevin bond as judgment against surety on bond, see notes in 9 Ann. Cas. 157; Ann. Cas. 1915D, 407.

3. On waiver of objection to testimony by cross-examination, see notes in Ann. Cas. 1918D, 202; 33 L. R. A. (n. s.) 103.

Mr. Geo. W. Farr and *Mr. H. E. Herrick*, for Appellant.

Mr. Sharpless Walker and *Mr. W. H. O'Connell*, for Respondents.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

Action in claim and delivery to recover possession of cattle and horses, or the value thereof, by claim of special ownership and right to immediate possession, based on mortgages to plaintiff by Belle Shirley, dated November 19, 1915, to secure notes aggregating \$3,337, past due and owing to plaintiff.

It is alleged that defendants, having actual knowledge of the mortgages, on August 9, 1916, unlawfully and without consent of the plaintiff, and the mortgages being in full force and effect and valid and prior liens on the horses and cattle, seized the same and held possession at the time of the commencement of the action, and that plaintiff was entitled to immediate possession as holder and owner of the notes.

The defendants denied the material allegations of the complaint and set up that in an action on a promissory note, dated December 6, 1913, in which John M. Henry was plaintiff and Co. Shirley defendant, they attached the cattle and horses mentioned in the complaint on November 11, 1915, and afterward, by virtue of judgment for the plaintiff, took possession of the cattle and horses; that on September 15, 1915, Co. Shirley executed a bill of sale for the animals to Belle Shirley, his wife, fraudulently, without consideration, and not accompanied by immediate delivery and actual and continued change of possession. Issue was joined by reply. Plaintiff, before trial, by filing the bond required by law, took the animals into its possession.

The cause was tried to a jury, which returned a general verdict for the defendants, and judgment was entered thereon.

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From the judgment and an order denying a new trial, plaintiff appeals.

The language of the verdict is: "We, the jury in the above-entitled action find the issues herein in favor of the defendants and against the plaintiff." The judgment rendered thereon recites: "And it appearing that the property described in the plaintiff's complaint was delivered to the plaintiff, and that an undertaking has been filed herein on the part of the plaintiff, and H. F. Lee and G. N. Miles are its sureties who signed the undertaking in the sum of ten thousand dollars (\$10,000), pursuant to statute, to the effect that they were bound as therein required for the delivery of said property to defendants, if such delivery be adjudged, and for the payment of such sum to defendants as might for any cause be recovered against the plaintiff; Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed: That the defendant A. B. Middleton, as sheriff of Custer County, Montana, and M. E. Jones, as sheriff of Fallon County, Montana, do have and recover of and from the plaintiff, First National Bank of Reeder, North Dakota, and H. F. Lee and G. M. Miles, its sureties, the possession of the property described in plaintiff's complaint, as follows, to-wit: * * * And in case delivery cannot be had of said property, then said defendants do have and recover of the said plaintiff, and its said sureties, the sum of five thousand dollars (\$5,000), the value of said property, together with defendant's costs and disbursements herein incurred, taxed at \$92.10, and that the defendants have execution therefor."

The record shows without material conflict the different transactions as laid in the pleadings; the validity of the sale between Co. Shirley and his wife, Belle, being the point of balance between the rights of the plaintiff and defendants herein. The evidence on this issue was sufficient to warrant its submission to the jury.

It is contended the judgment is erroneous and is not supported by the verdict. In view of the fact that there was no dispute in the evidence as to the value of the animals, the general verdict is sufficient to support the judgment in the alternative against the plaintiff. But the judgment cannot, in this character of action, order execution against the sureties on plaintiff's bond. They are not before the court.

During the course of the trial in direct examination, defendants' witness related a conversation which Co. Shirley had in the witness' presence. The question was opportunely objected to, overruled by the court, and an exception duly noted. On cross-examination of the same witness, the conversation was repeated. The substance of it was an admission on the part of Co. Shirley that he had made the transfer to his wife in order to prevent Henry from getting the cattle for debt. Plaintiff assigns error on the ruling of the court admitting this testimony.

Co. Shirley had not been on the stand, and therefore could not be impeached. He was not a party to the action, and it was neither pleaded nor shown that he and plaintiff acted in concert or conspiracy. This testimony is purest hearsay and utterly incompetent; appearing as it does in the record, it is viciously prejudicial to plaintiff and patently improper. Defendants contend that since plaintiff cross-examined the witness and elicited a repetition of the testimony objected to, the error, if any, is cured. Not so. While there are a few authorities to the contrary, the circumstances are all different, and the overwhelming mass of adjudication favors plaintiff's position herein.

We have carefully analyzed the cases cited by defendants and find that, while they state a rule of curing error by cross-examination, yet from the facts and circumstances of each case it is plainly evident that they are in no sense applicable to the point as it is involved here.

In *Stewart & Co. v. Hermon*, 108 Md. 446, 20 L. R. A. (n. s.) 228, 70 Atl. 333, the action was for personal injuries,

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and over defendant's objection plaintiff was permitted to prove that shortly after the accident complained of, wherein the plaintiff, a janitor, suffered injuries to his hands by the breaking of a large pane of glass as he closed a window, a glazier was seen to nail strips on the window frame. The witness was cross-examined on the same matter, and the court even though holding the evidence of events transpiring after the happening of an accident is usually inadmissible, goes on to state that, "in the view we take of the case, the evidence is not important." No other construction can be put on this ruling save that the action of the court would have been different had the evidence been important.

Spears v. Black, 190 Mich. 693, 157 N. W. 382, is likewise cited by defendants. The objectionable matter in this case was admitted as part of the *res gestae* and was afterward made indisputably competent by the evidence of the defendant, who testified to the same effect.

In *Brownell v. Moorehead* (Okl.), 165 Pac. 408, the testimony sought to be stricken and not objected to until after given, was directly responsive and admissible for impeachment, and although admitted before a foundation was laid and improper when admitted, still the foundation was laid later and the error cured. The reason for this ruling was that counsel had no right to sit quietly by until the answer given directed his action.

In *Bliss v. Waterbury*, 27 S. D. 429, 131 N. W. 731, a document was admitted over defendant's objection as incompetent and immaterial. The objection should have been sustained at the time it was offered, but since the fact it tended to prove was disclosed by cross-examination, and it was both relevant and material, the error was cured.

On the other hand, we find it strongly, and, we think, properly, laid down that plaintiff's position herein is correct. "Nor can it matter, in the result, that the defendant's counsel, on cross-examination, asked the witness to repeat his

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account of the interview with the conductor. That course did not amount to a waiver of the right to urge the exception already saved to the ruling of the court in admitting the interview. Counsel might properly conform to that ruling for the purposes of the trial, without thereby waiving the right to review the admission of incompetent evidence that had come in, over his objection. After that evidence was before the jury, he might then combat it or meet it, as best he might, without waiving the exception already taken.” (*Barker v. St. Louis, I. M. & S. R. Co.*, 126 Mo. 143, 47 Am. St. Rep. 646, 26 L. R. A. 843, 28 S. W. 866, and cases cited.)

“Where an exception is duly taken to the admission of illegal testimony, it is not waived by mere cross-examination of the witness respecting it.” (*Marsh v. Snyder*, 14 Neb. 237, 15 N. W. 341.)

“There are cases holding that objections to testimony are waived when the objecting party on cross-examination subsequently goes into the same matter, but this is clearly against the weight of authority. It would indeed be a strange doctrine, and a rule utterly destructive of the right and all the benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony, because, by further inquiry, he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on his cross-examination repeat or restate some or all of his evidence given on his direct examination.” (26 R. C. L., Trial, 1052; *Cathey v. Missouri etc. Ry. Co.*, 104 Tex. 39, 33 L. R. A. (n. s.) 103, 133 S. W. 417, and note.)

The instruction given and complained of is correct. It is admitted by counsel to be the law wherein good faith as to sales between husband and wife is involved, and in our opinion good faith in the sale between Co. Shirley and his wife is of the very essence of this controversy.

For the reasons stated above, we recommend that the judgment and order be reversed and the cause remanded to the district court, with directions for a new trial.

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment and order be reversed and the cause remanded to the district court, with directions for a new trial.

Reversed.

STATE EX REL. BROADWATER FARMS CO. ET AL.,
APPELLANTS, v. BROADWATER ELEVATOR CO. ET AL.,
RESPONDENTS.

(No. 4,482.)

(Submitted September 23, 1921. Decided October 27, 1921.)

[201 Pac. 687.]

*Conversion — Grain Elevators — Warehousemen — Bailment —
Sales—Statutory Measure of Damages—Evidence—Varying
Written Contract—Custom—Suretyship.*

Grain Elevators—Conversion—Warehouse Receipts—Varying Contracts by Parol Testimony.

1. Warehouse receipts for grain stored in an elevator issued under the provisions of the Grain Elevator Act (Laws 1915, Chap. 93) constituted binding contracts between the bailor and bailee which could not be varied or contradicted by parol testimony, the effect of which was to show that the transaction amounted to a sale and not a bailment.

Same—Warehousemen—Bailment—Agency—Sale by Elevator of Stored Grain to Itself Void.

2. An elevator company with which grain was stored for sale, having been the agent of the bailor, could not make a sale to itself.

Same—Bailment—Sale Subject Matter—Prerequisite.

3. Where grain stored in an elevator had been sold by defendant immediately upon its receipt, defendant's contention in an action for

1. On the general rule that parol evidence not admissible to vary, add to, or alter a written instrument, see notes in 56 Am. St. Rep. 659; 17 L. R. A. 270.

On effect as to warehousemen of recitals in their receipts, see note in 19 L. R. A. 302.

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conversion that by transactions had between it and plaintiffs some time after the issuance of warehouse receipts a sale of the grain had been consummated, *held* without merit, since then, the grain having been sold theretofore, there was no subject matter with relation to which the parties could enter into a contract of sale.

Same—Custom and Usage—When not Available as Defenses.

4. Since the Grain Elevator Act prescribes the mode in which the affairs of elevators shall be conducted, its provisions in this respect are the guide, and not usage or custom in conflict therewith.

Same — Conversion — Compromise and Settlement — Promise to Pay not Settlement in Absence of Payment.

5. One may not convert the property of another and escape liability by agreeing to pay a stated sum and then failing to make payment, where the transaction was intended to be a cash one.

Same—Conversion—Statutory Measure of Damages.

6. Where an action in conversion has been prosecuted with reasonable diligence, the plaintiff may exercise the option granted him by section 6071, Revised Codes, of demanding the highest market value of the property at any time between the conversion and the verdict, by giving notice, if he has not otherwise limited himself by his pleading, at any time before the submission of the cause for verdict or decision.

Same—Conversion—Statutory Measure of Damages Controlling.

7. Where plaintiff in an action in conversion has brought himself within the rule requiring diligence in prosecuting the action (Rev. Codes, sec. 6071), the fact that the measure of damages recoverable under it may be inequitable and unjust cannot deprive him of his right to recover the highest market value of the property at any time between the conversion and the verdict, at plaintiff's option, which he might have obtained but for the wrongful act of defendant.

Same—Bailment—Conversion—Minimizing Damages.

8. A bailor of grain stored in a public elevator is under no legal obligation to purchase grain in the open market in order to minimize the damages for which the warehouseman may be liable in case of wrongful conversion of the grain.

Same—Conversion—Date.

9. Ordinarily the date of demand and refusal is the date of conversion, but, if an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event.

Same—Suretyship—Unauthorized Withdrawal of Bondsman—Effect.

10. Release or withdrawal of a surety on a bond given under the Grain Elevator Act, without the consent of the bailor of wheat, is no defense in an action for damages for the wrongful conversion of the grain stored.

Appeals from District Court, Broadwater County; John A. Matthews, Judge.

ACTION by the State of Montana, for the use and benefit of the Broadwater Farms Company and others similarly situ-

7. Measure of damages in actions for conversion, see notes in 24 Am. Dec. 70; 54 Am. Rep. 421.

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ated, against the Broadwater Elevator Company and others. From a judgment in their favor deemed inadequate, and from an order denying their motion for a new trial, the plaintiffs appeal. Order affirmed and cause remanded, with instructions to modify judgment.

Mr. James A. Walsh and *Mr. C. P. Cotter*, for Appellants, submitted a brief; *Mr. Walsh* argued the cause orally.

The parties are entitled to recover the highest market price of wheat from the date of conversion to the date of decision. It is not necessary, in the pleading, to demand the highest market price. It is sufficient, as was done in this case, if the plaintiff will announce that the highest market price was and would be claimed. (*Potts v. Paxton*, 171 Cal. 493, 153 Pac. 957; *Funk v. Hendricks*, 24 Okl. 837, 105 Pac. 353.) Section 6071 of the Revised Codes defines the measure of damages. The provisions of the statute are clear and the decisions of supreme court construing that statute are decisive. (*Smith v. Caldwell*, 22 Mont. 339, 56 Pac. 590; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Posey v. Gamble*, 148 Ala. 660, 41 South. 416; *Gregg v. Bank of Columbia*, 72 S. C. 458, 110 Am. St. Rep. 633, 52 S. E. 195; *Succession of Gragard v. Metropolitan Bank*, 106 La. 298, 30 South. 885; *First Nat. Bank v. Red River Bank*, 9 N. D. 319, 83 N. W. 221 (this latter case related to conversion of wheat); *Learock v. Paxson*, 208 Pa. St. 602, 57 Atl. 1097.)

Sureties on a bond are liable for the damages prescribed by the Code. There cannot be one rule of damages for the principal and another for the sureties. The question has been seldom presented to the courts and the authorities are not numerous; however, we call attention to the following: *Fuller v. Calkins*, 22 Iowa, 301; *Gilbert v. Isham*, 16 Conn. 525; *Wylie v. Gallagher*, 46 Pa. St. 205; *Smith v. United States* (Ariz.), 45 Pac. 341.

The duty of the elevator company was to retain the wheat or the same quantity of wheat of like character in its ele-

vators in Montana, or in a terminal elevator, where it could be delivered to the Broadwater Farms Company on demand according to the terms of the storage certificate. In fact, the elevator company was guilty of grand larceny in selling the wheat. (*State v. Rieger*, 59 Minn. 151, 60 N. W. 1087.)

Messrs. Walsh, Nolan & Scallon, for Respondents, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

The contention of the respondents is that when the wheat was delivered there was a sale of same; part of the purchase price was paid, and the balance of the purchase price was to be paid whenever the price was agreed on, the price to be determined by the market quotations prevailing at a designated time, to be fixed by the grain owners. This being true, the sureties could not be held responsible on the bond that was executed by them. The contract of the sureties imposed a liability on them only in the case of a bailment and as the transaction involved a sale of the wheat, the sureties, not consenting to this change in the relationship existing, were not liable. We insist, then, that on the proof, which unqualifiedly preponderates against the findings, there can be no question but what the transaction constituted a sale of the wheat to the warehouse company. (3 Ruling Case Law, p. 76; *Cloke v. Shafroth*, 137 Ill. 393, 31 Am. St. Rep. 375, 27 N. E. 702; *Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207; *Barnes v. McCrea*, 75 Iowa, 267, 9 Am. St. Rep. 473, 39 N. W. 392; *Bretz v. Diehl*, 117 Pa. St. 589, 2 Am. St. Rep. 706, and note, 11 Atl. 893; *Bonnett v. Farmers & Growers' Shipping Assn.*, 105 Kan. 121, 181 Pac. 635; *Savage v. Salem Mills Co.*, 48 Or. 1, 10 Ann. Cas. 1065, 85 Pac. 69; see note, 10 Am. & Eng. Ann. Cas., p. 1065.)

This brings us to the consideration of the question as to whether, assuming now that the transactions under consideration constituted sales, the sureties can be held responsible on the bond executed by them. It is too apparent to need discussion that a surety may be willing to assume responsi-

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bility on a bond where the grain is to be retained by the warehouseman and may not be willing to assume responsibility where a transaction occurs such as the evidence discloses took place here. It needs no elaborate, if any, effort to show that the responsibility assumed is much greater in the latter case. In the one instance, the surety is protected against the dishonesty of the warehouseman should he convert the grain to his own use, as in that case, for such misconduct the warehouseman could be prosecuted criminally. In the other case, the transaction involves no criminal risk to the warehouseman should he refuse to pay over the balance of the money due to the grain owner. It is familiar law, says this court, "that engagements of suretyship are *strictissimi juris*; the sureties are entitled to stand upon the exact letter of their bond; they cannot be charged beyond its terms." (*Standard Sewing Machine Co. v. Smith*, 51 Mont. 245, L. R. A. 1918A, 292, 152 Pac. 38; 21 Ruling Case Law, secs. 50, 53; *First National Bank v. Gerke*, 68 Md. 449, 6 Am. St. Rep. 456, 13 Atl. 358; *Thompson v. Metropolitan Bldg. Co.*, 95 Wash. 546, 164 Pac. 222; *United States Glass Co. v. West Virginia Flint Bottle Co.*, 81 Fed. 993; *Peru Plow & Wheel Co. v. Ward*, 1 Kan. App. 6, 41 Pac. 64.)

It is claimed that the highest price which the grain reached up to the time of the trial should be fixed as the measure of damages. There seems to be a disposition on the part of some courts where statutes exist, such as we have in Montana, to reject this rule whenever the same is possible, characterizing it as an unjust basis for estimating damages. (*Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507.) The present action is an equitable one, and it would be inequitable to fix as a measure of damages prices which necessarily have nothing to do with normal conditions. We insist likewise that the appellants are not in a position to insist on this measure of damages, as the duty devolved upon them to minimize the damage as much as possible. After they learned that the conversion of this wheat had taken place, it was

incumbent upon them to replace the same in the event that it was their purpose to retain the wheat, and if not, surely they should not be allowed damages in excess of what the wheat could be purchased for within a reasonable time after the conversion took place. The price was agreed on, and if the money was available at this time a settlement could be effected at this price. It is settled law in cases of this kind and in all cases where a like principle is involved that the party injured must minimize the damages as much as possible. (*Ashley v. Rocky Mt. Bell Tel. Co.*, 25 Mont. 286, 64 Pac. 765; *Sweeney v. Mont. Cent. Ry. Co.*, 25 Mont. 543, 65 Pac. 912; *Tiggerman v. City of Butte*, 44 Mont. 138, 119 Pac. 477; *Freeman v. Chicago, M. & St. P. Ry.*, 52 Mont. 1, 154 Pac. 912.) The record clearly discloses that the appellants fixed the time at which they concluded to dispose of their wheat. It seems that the market quotations had reached such a figure as to induce them to sell the wheat at the price then prevailing. Every principle of reason and justice requires that the price which was then agreed to should be the price that should be adopted. (*Wright v. Bank of Metropolis*, 110 N. Y. 237, 6 Am. St. Rep. 362, 363, 1 L. R. A. 289, 18 N. E. 79.) All of the claimants' made demand for specific amounts. We submit that the amount so demanded marked the full measure of liability under the provisions of this section, and these are the amounts which are provided for in the judgment appealed from.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal by plaintiffs from a judgment in their favor, made and entered by the court sitting without a jury, and also from an order denying plaintiffs' motion for a new trial. The ground of the appeal is that the judgment is inadequate in amount and that the bondsmen were held not liable as to a part of the judgment.

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The Broadwater Elevator Company was a corporation and a public warehouseman, licensed to do business under the provisions of Chapter 93 of the Laws of 1915, and owned and operated an elevator at Townsend and also one at Toston, Montana. The defendants Whaley, Faltemeyer, Geehan, Dixon, and Hayes were the bondsmen of the defendant company. In the fall of 1915, the plaintiffs delivered to the defendant elevator company certain wheat and received storage receipts therefor. These receipts contained the facts required to be stated by section 31 of said Chapter, and also by indorsement contained the provisions of section 36, relating to the limitation of charges, are substantially in the same form, and we quote one of them here and the indorsements, in so far as material to this case:

“Montana Storage Receipt Approved June, 1915.

“Broadwater Elevator Company No. 14.

“Townsend, Montana, Nov. 15, 1915.

“Operated as a Public Warehouse under License Issued by the State Grain Inspection Department of the State of Montana.

“Received in store from Broadwater Farm Co. Four thousand nine hundred twenty-six bushels of 2 H. W. (kind or grade of grain).

“Weighed and graded by Thos. Sheehan.

“Gross lbs.

“Tare.

“Net lbs.

“Gross bus. 4,967.50.

“Dockage, 41.50.

“Net bus. 4,926.00.

“This lot of grain has been stored with grain of the same kind and grade and a similar quantity and grade is deliverable upon the return of this receipt properly indorsed by the person to whose order it was issued and the payment of the proper charges for storage and handling.

“This grain is insured for the benefit of the owner.

“Dockage on wheat and rye is in pounds per bushel; on flax in percentage of the gross amount. No dockage is permitted on other grain.

**"BROADWATER ELEVATOR COMPANY,
"By A. W. FINCH, Manager.**

“Advanced—

“60c per bushel.”

Indorsed on back thereof:

“Subject to the following charges and conditions.

“1. [Relates to the limitation of charges.]

"2. [Relates to cleaning of the grain.]

“3. Our account for seed, bags, merchandise or cash that we may have furnished or become responsible for, with interest due thereon until paid.”

The remainder of the indorsements have no relation to the questions presented on this appeal.

The particular questions presented are:

(1) Was the original transaction a sale or a bailment, and incidentally involving the admissibility of certain oral evidence?

(2) Did the transactions subsequent to the issuance of the storage receipts constitute a sale of the wheat to the elevator company?

(3) What is the measure of damages?

(4) Are the bondsmen liable?

The respondents admit that, not having taken any appeal, they cannot be heard to question the sufficiency of the judgment or to assail it in any manner, but insist that inasmuch as the appellants ask to have the judgment set aside and a new final judgment entered, they have the right to urge what they deem as errors committed by the trial court in combating the new condition that would be thus thrust upon them, and in support of this position cite: 4 C. J. 695, 696; *Landrem v. Jordan*, 203 U. S. 56, 51 L. Ed. 88, 27 Sup. Ct. Rep. 17 [see, also, Rose's U. S. Notes]; *Philadelphia Casualty Co. v. Fechheimer*, 220 Fed. 401, Ann. Cas. 1917D, 64, 135

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C. C. A. 25; *MacGinniss v. Boston & M. etc. Co.*, 29 Mont. 428, 75 Pac. 89.

Whatever the rule may be, in the present case the entire record has been examined, and necessarily so from the questions above enumerated.

1. At the trial of the action the defendants, over the objection of the plaintiff, introduced evidence to the effect that prior to and at the time of the issuance of the warehouse receipt an oral agreement was entered into between the parties which amounted to a sale of the wheat to the elevator company instead of a bailment. The appellant maintains that this evidence was incompetent.

The provisions of section 7873, Revised Codes, are well known. Where an agreement has been reduced to writing, it is presumed to contain all the terms, and evidence varying or contradicting this writing is not admissible except in cases of mistake or imperfection, or where the validity of the agreement is the fact in dispute. The provisions of this section do not, in proper cases, exclude evidence of the circumstances under which an agreement was made, or to which it relates. (*Sathre v. Rolfe*, 31 Mont. 85, 77 Pac. 432; *Gardiner v. McDonogh*, 147 Cal. 318, 81 Pac. 964.) However, none of these exceptions appear to be present in this case.

The respondents, in support of their contention, cite *Gafford v. Globe Transfer & Storage Co.*, 71 Wash. 204, 128 Pac. 228; *Windell v. Readman Warehouse Co.*, 30 Wash. 469, 71 Pac. 56; *McCurdy v. Wallblom Furniture etc. Co.*, 94 Minn. 326, 3 Ann. Cas. 468, 102 N. W. 873. An examination of those cases discloses a different state of facts from that appearing in the instant case. In the *McCurdy Case* the plaintiff had stored certain goods with the defendant company and "was given a warehouse receipt in conventional form, which provided for storage generally, but did not specify where the goods were to be kept." Subsequently, the bailee, without the knowledge or consent of the bailor, removed the goods to another place, where they were de-

stroyed or damaged by fire. Oral evidence was admitted for the purpose of showing that the goods were to be stored and kept at the place where they were delivered by the bailor. In the *Gafford* and *Windell Cases* the goods were left for storage and not any receipts given at the time to the bailors, but were subsequently made out by the bailee and mailed to the bailors. In the actions brought for damage to the goods the bailors were permitted to introduce oral evidence of the contract of storage entered into between the parties at the time, on the theory that the receipts which had been subsequently made out by the storage companies and mailed to the bailors did not express the contract of storage, but were simply unilateral agreements on the part of the storage companies, which were not binding upon the other party until accepted by him. In the *Windell Case* the court sustained an instruction given to the jury to the effect that if the warehouse receipt was delivered to the plaintiffs, and they understood it at the time and it expressed the contract of storage, then the written contract contained in it was controlling and could not be varied or contradicted in any manner by an oral agreement or any evidence thereof.

The receipts in the present case were prepared by the defendant company, signed by it, and by it delivered to the plaintiffs. The defendant company thus knew of their contents and provisions; they were accepted at the time by the other parties and retained by them, and no claim is made by plaintiffs that they did not know the contents. Hence they became binding contracts on all of the parties, for it would be an idle provision of law to require a receipt to be issued which was not binding. The law specifically prohibits a public warehouseman from inserting "in any storage receipt any language limiting or modifying his liabilities or responsibilities as imposed by law." (Sec. 31, Chap. 93, Laws 1915.) The warehouseman being prohibited by law from inserting such a provision in the receipt, he cannot read it therein by proving a prior parol or contemporaneous agree-

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ment, converting the storage receipt into a bill of sale or limiting his liabilities to that of a purchaser. The receipts issued and outstanding are binding contracts, and it was error to admit this evidence. A bill of sale, not a bailee's receipt, is the proper instrument in case of a sale. Some of the receipts issued contain on their face the word "advanced," followed by a statement in figures of the amount of money paid to the owner at the time of the deposit. Plaintiffs admit that the money advanced was to be taken out of the sales price of the wheat when sold, but deny that there was any agreement as to when or to whom a sale would be made. Plaintiffs also admit that they could not demand the return of the wheat without the payment of charges and tendering the money advanced, with the interest. Defendants admit that this was done, and the bailee is fully protected by the provisions of the third indorsement on the back of the receipts. The receipts on their face show that the grain stored is charged with the amount of "cash" * * * furnished," and neither the original holder nor his assignee could compel the return of the grain without returning the money so advanced, with interest thereon.

2. It is claimed by respondents that the transactions subsequent to the issuance of the warehouse receipts constitute a sale. The wheat was delivered to the defendant company in November and December, 1915. The evidence of plaintiff is that demand for the return of the wheat was made by and on behalf of the Crowley and D'Arcy interests in the latter part of May or the fore part of June, 1916, and that there was at that time an effort made to effect a money settlement, but the same was not consummated and no money was paid nor wheat delivered. Defendant denies any demand for the wheat at that time and claims that a fixed price was agreed upon, but admits that nothing was paid and that prior to that time it had sold all of the wheat in its possession. On June 9, 1916, the plaintiff Broadwater Farms Company wired the defendant company from Chicago:

“Sell our wheat immediately at Mpls price and send draft to me. Wire price to-day at which sold.” On the same date the defendant company replied: “Sold your wheat as your wire. Our market here to-day Basis Mpls eighty-three cents. Mail storage ticket to State Bank Townsend and will take up at once.” On June 20, 1916, the Broadwater Farms Company wrote the defendant company requesting that they be paid eighty-five cents for their wheat. A. W. Finch, manager of the defendant company and called as a witness for defendant, in answer to questions asked him on cross-examination, testified: “Q. Had you made arrangements with the State Bank of Townsend to take up this wheat certificate that was delivered there? A. No, sir. Q. Did you have any money in the bank to take it up? A. I wasn't doing business at the State Bank of Townsend; it was simply a matter of business that I presumed they would want to— Q. Did you expect the bank would take it up? A. No, sir.” The witness further stated that at the time the defendant company did not have any elevator in Townsend or elsewhere, but had previously sold its elevators; that the wheat had been sold and the proceeds lost in the purchase of options, on grading, or in shipment; that he expected to raise money by having the bondsman sign a note, but failed. Witness further testified that at the time he sent this wire he did not deliver any wheat to the alleged purchaser nor receive any money from it; that there was no wheat there to deliver or to sell; that the company was at that time unable to pay its debts, although it had not been declared a bankrupt. The appellant maintains that the defendant company was the agent of the Broadwater Farms Company for the sale of wheat, and for that reason could not legally make a sale to itself. Under the facts in this case, the position of the appellant is well taken. (*Jensen v. Williams*, 36 Neb. 869, 20 L. R. A. 207, 55 N. W. 279, 281; 4 R. C. L., sec. 25, pp. 276, 277.) But this alleged sale is void for another reason. There was not at that time, nor afterwards, in existence any subject matter with refer-

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ence to which the parties could contract. As early as May 10, 1916, the defendant company sold its elevator and all the few bushels of grain it then had. In fact, the wheat of all of these plaintiffs was sold immediately after its receipt at the elevator in November and December, 1915. Had the wheat been returned in kind, the plaintiffs could not have complained. At no time were these warehouse receipts called in, but were at all times and are yet outstanding, nor is there any evidence here that the books of the company contain any entry of the purchase of this wheat, as the law requires. (Sec. 39, Chap. 93, [4] Laws 1915.) It is claimed by defendant company that it followed the usage and custom of elevators, but the specific provisions of the law furnish the guide, and not usage and custom.

The Minnesota supreme court held that, although the warehouse receipt contained a provision giving the warehouseman the option to purchase upon the return of the receipts, he was guilty of a violation of law if he disposed of the wheat prior to the return of the receipt. The statute in that state may not be the same as the statute here, but the court nevertheless gave to the act a strict construction, for the protection of those who parted with the possession of their property and intrusted it to the honesty of others. (*State v. Rieger*, 59 Minn. 151, 60 N. W. 1087.) Under these facts we are impelled to the conclusion that there never was any sale of this grain to the defendant elevator company, and that it actually converted the same long prior to the demand made by the bailors. To epitomize—the owners attempted to recover their grain or the money therefor and did not get [5] either. The law will not permit one to convert the property of another and to escape liability by simply agreeing to pay a stated sum and then not making payment when it is to be a cash transaction. The payment of the consideration is necessary to the consummation of a settlement unless time is given, and if payment is not made the entire effort fails.

3. Section 6071, Revised Codes, prescribes the rule of damages to be assessed in actions of wrongful conversion, and in so far as it has relation to the questions here presented is as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." The statement contained in section 32, Chapter 93, Laws of 1915, does not change this rule of damages.

At the trial, and before the introduction of any evidence, plaintiffs served notice that they demanded the highest market price of wheat between the date of the conversion and the date of the decision and judgment of the court. This seems to be sufficient to raise the question, unless the plaintiff has otherwise limited himself by his pleading. (*Potts v. Paxton*, 171 Cal. 493, 153 Pac. 957, 959; *Funk v. Hendricks*, 24 Okl. 837, 105 Pac. 352.) However, the time should terminate with the submission of the cause for verdict or decision. The respondents contend that in equity and good conscience they ought not to be required to do more than to pay to plaintiffs the amount plaintiffs were willing to accept prior to the institution of the suit, and which was then the prevailing price of wheat, with interest on that amount. In ordinary cases there would be force to this contention. The wheat was undoubtedly stored as the first step toward reaching a market. It was held for high prices. Although the owners may have been willing to accept a much lower price prior to the suit than that which afterward prevailed, they did not receive it, and the attempted settlement failed and the wheat was not returned; hence they were prevented by the wrongful act of the defendant company from selling to other parties or of holding for a higher price, which they had the legal right to do. Prior to the

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enactment of this statute the rule for the measurement of damages appears to have been very uncertain. (*Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.)

In considering the rule of damage under a section identical in language with that just quoted, the supreme court of North Dakota said: "In *Pickert v. Rugg*, [1 N. D. 230, 46 N. W. 446], the court took occasion to call attention to the injustice which will necessarily follow in many cases by an application of the rule promulgated by the legislature in the section just quoted, by giving to the injured party, not merely compensation for the injury he has suffered, but a right to recover the highest market value up to the time of the verdict, however fictitious that value may be. In the case at bar the recovery for the wheat converted bears no just relation to the damage which the plaintiff suffered. It is a misnomer to call it 'compensation.' It is largely punishment. But, however averse we may be to the rule, it is the rule which governs; and the plaintiff has an absolute right to recover the highest market price, if it so elects, provided only that it has prosecuted its action with reasonable diligence. Counsel for defendant contends that the court erred in determining that the facts show reasonable diligence in prosecuting the action. In *Pickert v. Rugg*, *supra*, it was held, in accordance with the prevailing opinion of the courts, that, where the facts upon the question of diligence are not in dispute, the question as to whether reasonable diligence has been exercised is ordinarily to be determined by the court, as a question of law; further, that the reasonable diligence required of a suitor relates both to the commencement of the action and the subsequent prosecution." (*First Nat. Bank of Fargo v. Red River Valley Nat. Bank of Fargo*, 9 N. D. 319, 323, 83 N. W. 221, 223.)

In considering the rule of damages, under a similar statute, the California court said: "With the equitableness of this rule of damage we cannot here be concerned. Nor can any arguments, however potent, touching the hardship of the

law and its invitation to unjust speculation upon the part of the plaintiff against the defendant, who should only be called upon to make good the loss which the plaintiff has sustained, have any effect to modify the plain provisions of the law as written. Our cases support the right of a plaintiff to a recovery such as plaintiff claims. (*Douglass v. Kraft*, 9 Cal. 563; *Hamer v. Hathaway*, 33 Cal. 119; *Tulley v. Tranor*, 53 Cal. 280; *Dent v. Holbrook*, 54 Cal. 145.)” (*Potts v. Paxton*, *supra*; *Smith v. Caldwell*, 22 Mont. 331, 56 Pac. 590; *Ferrat v. Adamson*, 53 Mont. 172, 181, 163 Pac. 112; *Funk v. Hendricks*, *supra*.)

If the provisions of section 6086 are binding in actions of conversion, the public warehouseman, notwithstanding the positive mandates of said Chapter 93, by operation of law is given an option to return the grain on demand or to pay the market price at that time, for that would be the measure of his liability. Both sections 6086 and 6087 are general provisions declaratory of principles of law already existing and if complaint is made that a judgment is “unreasonable,” “unconscionable,” or “grossly oppressive,” the appellate court will determine the matter from the evidence, and if there is no evidence the presumption governs. (*Ferrat v. Adamson*, *supra*.)

Nor is there any legal obligations resting on the bailor of [8] grain to purchase other grain in order to minimize the damages for which the warehouseman may be liable in case of wrongful conversion. The market is open to the warehouseman, and he may return the grain in kind.

The only question for determination by this court on this branch of the case is whether this action was commenced and prosecuted with reasonable diligence. The wheat was deposited in the fall of 1915 and receipts issued. The receipts do not prescribe any time within which the demand for return of the wheat must be had. These demands were not made until the spring and summer of 1916, and a great deal of that summer was spent in attempted settlement. There

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was temporizing and delay. On October 30, 1916, the complaint in this action was filed. On February 13, 1917, the answer of the defendants was filed. On February 17, 1917, the replication of plaintiffs was filed. On February 26, 1917, defendants filed an amendment to their answer and on that day the trial was had. There was not any evidence introduced here as to lack of diligence (*Wilson v. Mathews*, 24 Barb. (N. Y.) 295), and as a matter of law it appears from the record that there was not any lack of diligence, either in commencing or prosecuting the action. This being the case, the rule of the statute is binding upon this court, and the highest market price of the wheat between the date of the conversion and the time of the trial must be the measure of damages. The precise date of this conversion is difficult to fix. It appears from the evidence that the defendant company disposed of all of its holdings, including its elevators, at a date not later than May 10, 1916.

It is stated as a general rule that "Ordinarily, the date [9] of demand and refusal is the date of the conversion. If an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event." (38 Cyc. 2032, and note 74.)

The trial court fixed June 1st as the date of conversion as to the Crowley and D'Arcy interests, and it appears that the demand and refusal of the Farms Company interest was August 2, 1916. For the purpose of this decision, these dates will be considered as the dates of the conversion.

4. The purpose of the law in requiring a bond is to protect [10] the bailors from wrongful acts of the warehouseman, and if the principal is liable the sureties are liable. The release, or attempted release, or withdrawal of the bondsman without the agreement of the injured party is of no avail as a defense in an action for damages following from wrongful acts already done. The transaction by which Mr. Wilson disposed of the interest he had in the wheat in storage by the

Crowley brothers does not affect the merits of this controversy.

For the reasons herein stated, we recommend that the order appealed from be affirmed; that the cause be remanded to the district court, with instructions to modify the judgment appealed from by entering judgment in favor of the plaintiffs and against all of the defendants for the highest market price of the wheat prevailing, as appears from the evidence, between the date of the conversion as herein fixed and the date of the trial of the action, less the storage charges due in each case, less also the money advanced, with eight per cent interest thereon from the time the same was advanced up to the time of the demand and tender.

PER CURIAM: For the reasons given in the foregoing opinion, the order appealed from is affirmed; the cause is remanded to the district court, with instructions to modify the judgment appealed from by entering judgment in favor of the plaintiffs and against all of the defendants for the highest market price of the wheat prevailing, as appears from the evidence, between the date of the conversion as herein fixed and the date of the trial of the action, less the storage charges due in each case, less also the money advanced, with eight per cent interest thereon from the time the same was advanced up to the time of the demand and tender.

Modified and affirmed.

KOZASA, RESPONDENT, v. NORTHERN PACIFIC RAILWAY CO. ET AL., APPELLANTS.

(No. 4,494.)

(Submitted September 26, 1921. Decided October 27, 1921.)

[201 Pac. 682.]

Extortion — Payment — Duress — Threats — Pleading — Certainty—Complaint—Conclusions—Insufficiency.

Pleading—Object—Degree of Certainty.

1. The object of pleading is to notify the adverse party of the facts which the pleader expects to prove, and for that reason the allegation of such facts must be made with that certainty which will enable the opponent to prepare his evidence to meet the alleged facts.

Involuntary Payment—Recovery Back—Threats—Complaint—Conclusions—Insufficiency.

2. In an action to recover money claimed to have been involuntarily paid, the complaint, simply averring, by way of conclusion, that defendants by coercion, threats, and intimidation and by putting plaintiff in fear, extorted it from him, was insufficient to state a cause of action in the absence of an allegation of the facts constituting the legal basis for the charge of involuntary payment.

Appeals from District Court, Sanders County; Asa L. Duncan, Judge.

ACTION by K. Kozasa against the Northern Pacific Railway Company and another. Judgment for plaintiff and defendants appeal from it and from an order overruling their motion for a new trial. Reversed and remanded.

Messrs. Gunn, Rasch & Hall, for Appellants, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

The court erred in overruling defendants' demurrer to the second cause of action. It contains no allegation of facts to show what the alleged acts of coercion, threats and intimidation consisted of. It pleads nothing but conclusions. In *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. 276, it was held that a complaint alleging "that the money was exacted from him by fraud, threats and duress," without

stating what the fraudulent representations or conduct or threats were, was insufficient. (*Kamenitsky v. Corcoran*, 177 App. Div. 605, 164 N. Y. Supp. 297; *Rand v. Board of Commissioners of Hennepin County*, 50 Minn. 391, 52 N. W. 901; *Hanford Gas & Water Co. v. City of Hanford*, 163 Cal. 108, 124 Pac. 727; *Williams v. Stewart*, 115 Ga. 864, 42 S. E. 256; *O'Brien v. Quinn*, 35 Mont. 441, 446, 90 Pac. 166.)

No appearance on behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action consists of three paragraphs. [1, 2] In paragraph 1 it is alleged that the defendant railway company is a corporation organized under the laws of Wisconsin, and doing business in Sanders County, Montana. Paragraph 2 reads as follows: "That on or about the twenty-seventh day of October, 1917, the defendants above named, by coercion, threats, and intimidation and by putting plaintiff in fear, did extort from plaintiff property and money of the worth and value of \$829.75." In paragraph 3 it is alleged that since October 27, 1917, defendants have wrongfully detained the property and money without plaintiff's consent. Then follows the prayer. A general demurrer to the complaint was interposed but overruled, and, at the opening of the trial, counsel for defendants objected to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled, and exception reserved. The trial resulted in a verdict and judgment in favor of the plaintiff for the amount claimed, and defendants appealed therefrom and from an order denying them a new trial.

The gravamen of the plaintiff's cause of action must be found, if at all, in paragraph 2 of the complaint, quoted above. Section 6532, Revised Codes, provides that a complaint must contain "a statement of the facts constituting

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the cause of action." Paragraph 2 states but a bald, legal conclusion. Whether defendants obtained plaintiff's property by extortion depends upon certain facts. Sections 8663 and 8664, Revised Codes, read as follows:

"8663. Extortion is the obtaining property from another with his consent induced by wrongful use of force or fear or under color of official right.

"8664. Fear, such as will constitute extortion, may be induced by a threat either—

"1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,

"2. To accuse him or any relative or member of his family of any crime; or,

"3. To expose or impute to them or him any deformity or disgrace; or,

"4. To expose any secret affecting him or them."

In an action to recover money paid involuntarily, the complaint must state the facts which constitute a legal basis for the charge of involuntary payment, so that the court may be able to determine whether the pleader's conclusion is justified. (*Kamenitsky v. Corcoran*, 177 App. Div. 605, 164 N. Y. Supp. 297; *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. 276; *Hanford Gas & Water Co. v. City of Hanford*, 163 Cal. 108, 124 Pac. 727; *Grant v. Williams*, 54 Mont. 426, 171 Pac. 276.) "The object of pleading is to notify the opposite party of the facts which the pleader expects to prove, and so it is that the allegation of such facts must be made with that certainty which will enable the adverse party to prepare his evidence to meet the alleged facts." (21 R. C. L. 436.)

This complaint does not give to the defendants the slightest intimation of the facts which they would be called upon to meet at the trial, and for this reason it does not state a cause of action, and will not sustain a judgment.

Whether it is possible for plaintiff to state a cause of action, in view of the testimony given by him upon the trial of this case, is a question we do not determine. He has not appeared in this court or furnished any brief, and we reserve our opinion until the matter has been presented fully.

The judgment and order are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

PATRICK & CO., APPELLANT, v. McDONNELL, RESPONDENT.

(No. 4,488.)

(Submitted September 24, 1921. Decided October 31, 1921.)

[201 Pac. 1009.]

Assignments for Benefit of Creditors—Continuance of Business of Assignor—Injunction—Statutes—Power of Court.

Assignment for Benefit of Creditors—Object and Purpose.

1. The object of an assignment for the benefit of creditors is not to permit speculation with the property of the assignor but to use the assets for the satisfaction of the creditors' claims.

Same—Continuance of Business of Assignor—Consent of Creditors Necessary.

2. In the absence of an agreement by all the creditors of an assignor, one merely acquiescing but not actually consenting may enjoin continuance of the business as a going concern, even though it appear that the course pursued may be for the benefit of the creditors.

Same—Continuance of Business of Assignor—Statute—Limit of Authority of Court.

3. While under Chapter 180, Laws of 1919, the district court may, when necessary for the best interests of the estate of an assignor, authorize his business to be conducted for a limited period of time, it may not do so for an unlimited period.

Same—Contract—Statute not Retroactive.

4. An assignment for the benefit of creditors is in effect a contract, and therefore where an assignment was made before the passage of

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Chapter 180, Laws of 1919, giving the district court power under certain circumstances to permit the assignee to conduct the business of the assignor as a going concern, the Act cannot be given a retroactive effect to impair the obligation of such contract.

Appeals from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by F. A. Patrick & Co. against L. M. McDonnell, assignee of P. A. St. Amour. From a judgment for defendant and an order overruling motion for new trial, plaintiff appeals. Reversed.

Mr. T. F. McCue, for Appellant, submitted a brief and argued the cause orally.

Under the admitted facts in this case, the plaintiff was entitled to a restraining order enjoining the assignee from speculating with the assigned property and from permitting the assignor to do likewise, as a period of nearly six months had elapsed in which large sums of money had been expended for the purchase of new goods, one-half of which, if applied to the extinguishment of the unsecured debts, would have paid the same in full. Not only that, but the assignor was permitted to extend credit, to speculate and subject the assigned property to the hazard of extending credit to the purchasers to the amount of over \$62,000, \$6,000 of which the assignee had failed to collect at the time of this action.

The case of *Wilhelm v. Byles*, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113, is directly in point upon this question. (See, also, *Rosenstein v. Coleman*, 18 Mont. 459, 45 Pac. 1081; *Bowen v. Parkhurst*, 24 Ill. 257, 258; *Field v. Romero*, 7 N. M. 630, 41 Pac. 517.)

The judgment of the lower court gave the assignee a free hand to handle the trust property in almost any manner he saw fit. Not only that, but if that decree stands, it will point out a way for every failing creditor to put his property in the hands of a trustee of his choice; place it beyond the

reach of the usual processes of courts, and arbitrarily extend the time of payment of his debts, to suit his own convenience. To permit an assignee to enable a debtor to accomplish such a result, either under the provisions of the deed of assignment or on account of the conduct of the trustee, has been condemned by all the courts as a fraud. (*Rosenstein v. Coleman, supra; Willoughby v. Reynolds*, 19 Mont. 421, 48 Pac. 743; *Richardson v. Marqueze*, 59 Miss. 80, 42 Am. Rep. 353; *Gutta Percha Rubber Mfg. Co. v. Kansas City Fire Dept. Supply Co.*, 149 Mo. 538, 50 S. W. 912.)

Under the prayer for general equitable relief, it was the duty of the court to render such a decree as would compel defendant to do those things which the law requires under the material allegations of the complaint which were admitted or proved. (*Custer Co. v. Yellowstone Co.*, 6 Mont. 39, 46, 9 Pac. 586; *Rollins v. Forbes*, 10 Cal. 299; *Pond v. Waterloo Agricultural Works*, 50 Iowa, 596, 605.)

Messrs. Cooper, Stephenson & Hoover and *Mr. Gerald Frary*, for Respondent, submitted a brief; *Mr. W. H. Hoover* argued the cause orally.

We feel that a consideration of the authorities will convince the court that plaintiff had no right to complain. The only decision in plaintiff's brief bearing upon what conduct may be expected of an assignee after the property is vested in him is the case of *Wilhelm v. Byles*, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113. So far as we know, this is the strongest case in support of the doctrine claimed by plaintiff that appears in the books. We take no exception to the principles there announced, but the decision has no application to a case where the complainant has consented to the carrying on of the business by the assignee. The court in the case cited expressly limits its decision. Before entering into the main discussion it says: "The complainants have not consented to carrying on of the business by the assignees." The same limitation appears in the case of *Rosenstein v. Cole-*

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man, 18 Mont. 459, 45 Pac. 1081. (See, also, 4 Cyc. 276; 2 R. C. L. 722.)

The right of an assignee to carry on the business of the assignor as a going concern, and to add new goods thereto and mingle them with the assigned property, with the consent of the creditors, was recognized and protected in the case of *Noyes v. Beaupre*, 32 Minn. 496, 21 N. W. 728. In the case of *Adlum v. Yard*, 1 Rawle (Pa.), 163, 18 Am. Dec. 608, an assignment by which the trustees were restrained from selling the land for a period of three years was upheld as against a creditor who had accepted a dividend under the assignment. (See, also, *Ingram v. Hartz*, 48 Pa. St. 380; *Burrows v. Alter*, 7 Mo. 424; *Rapalee v. Stewart*, 27 N. Y. 310, 311; *Lanahan v. Latrobe*, 7 Md. 268; *Loney v. Bayly*, 45 Md. 447, 450; *Richards v. White*, 7 Minn. 345, 349; *Derry Bank v. Davis*, 44 N. H. 548; *Quimby v. Uhl*, 130 Mich. 198, 89 N. W. 722.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Action was brought to enjoin defendant, as assignee of P. A. St. Amour, from continuing the business formerly conducted by his assignor and for an order requiring him to liquidate the estate, pay off the claims to the extent that the assets of the estate would pay them, and terminate his trust. Judgment was entered for defendant. Motion for new trial was overruled. Plaintiff appeals from the judgment and the order overruling the motion.

In February, 1918, P. A. St. Amour made an assignment for the benefit of his creditors to defendant McDonnell. With the consent of a majority of the creditors, the assignee, instead of liquidating the assets, continued the retail business of the assignor as a live and going concern. He employed the assignor to assist in the management of the business and, in fact, intrusted the assignor with most of its details. Clerks were employed and an active business was continued for a

period of about one year prior to the commencement of this action. During that period the assignee, upon the advice of the assignor, purchased new stock to the extent of over \$50,000 and in the usual course of business extended credit to customers in excess of \$62,000. In addition to the assignee's salary, there was also incurred a general expense of about \$10,000. It seems that it was the intention of the majority of the creditors and the assignee that the latter should continue the business as a going concern until such time as its net income would be sufficient to defray the indebtedness. It is the contention of plaintiff, however, that in the absence of consent of all the creditors, the assignee has no right so to do, and we are satisfied that such contention must be sustained.

This is not a question as to whether the creditors will receive a larger percentage by a continuance of the business or such an arrangement in general would be beneficial to all parties concerned, but it is a question of the obligation of the trustee to each individual creditor. It may be conceded that if all creditors consent to such an arrangement, then the assignee would be justified in following out such a plan, for then no one would be in a position to make any objection thereto. However, in the absence of an agreement by all the creditors any one creditor is entitled to have his rights as a creditor recognized and observed and to have the assignee perform the duty enjoined upon him by law.

An assignment for the benefit of creditors is designed to terminate the business of the assignor in relation to the assigned property, and it is then the duty of the assignee, with reasonable dispatch, to collect all the assets and convert them into cash and, after paying the expenses of the trust, apply the moneys in hand to the payment of the claims proportionately, accounting to the assignor for any surplus that may remain after the claims have been paid in full. After the assignment is made, no creditor can be compelled to submit to a continuance of the business as a going concern,

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with the incidental risks of buying and selling on credit and the possible loss of assets actually in existence at the time of the assignment. The object of the assignment is not to enable any person to speculate with the property of the assignor, even though it be for the benefit of the creditors, but merely to use those assets to satisfy the claims. (*Wilhelm v. Byles*, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113; *Rosenstein v. Coleman*, 18 Mont. 459, 45 Pac. 1081.) Defendant, however, insists that in this case it appears by the correspondence between the plaintiff and defendant that plaintiff consented to the continuance of the business, and that therefore it is estopped now from objecting thereto. An examination of the correspondence shows that the plaintiff had some knowledge of the fact that the business was being conducted as a going concern, but, at most, the correspondence shows a mere acquiescence but not a consent. We do not believe that there is anything in the correspondence which estops the plaintiff from demanding a settlement of this trust.

Our attention has been called to Chapter 180 of the Session [3, 4] Laws of 1919, in which it is provided as follows:

“E. *Power of Court*.—The court shall have power: (1) To authorize the business of the assignor to be conducted for a limited period by assignee, if necessary in the best interests of the estate, and allow additional compensation for such services.”

This statute is inapplicable for two reasons: First, that it does not appear in this case that the court authorized a continuance of the business for a limited time. If the judgment in the case is to be construed as implied authority to continue business—which is doubtful—it must be construed as authority to continue the business for an unlimited time, which is not within the provision of the statute. There was no other court order or judgment authorizing the continuance of the business at all. Second, the statute was not passed until about a year after the assignment was made.

As the assignment is, in effect, a contract, the statute cannot be given retroactive effect so as to destroy the validity of the contract or affect the obligations by it imposed upon the assignee.

For the reasons herein given, the judgment and the order overruling the motion for new trial are reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

COMMERCIAL NATIONAL BANK OF GREAT FALLS,
RESPONDENT, v. THRASHER, APPELLANT.

(No. 4,486.)

(Submitted September 24, 1921. Decided November 3, 1921.)

[201 Pac. 1009.]

Appeal—Bill of Exceptions—Settlement—Unreasonable Delay—Effect.

1. Where defendant did not present his bill of exceptions to the trial judge for settlement until 172 days after plaintiff had served upon him its proposed amendments, in violation of section 6788, Revised Codes, which requires presentment of the bill within ten days after service of the proposed amendments, the record being barren of any excuse for the delay, the supreme court will disregard the bill together with all the questions sought to be presented for review thereby.

Appeals from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by the Commercial National Bank of Great Falls against J. W. Thrasher. From judgment for plaintiff and order denying new trial, defendant appeals. Judgment and order affirmed.

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Messrs. Freeman & Thelen, for Appellant, submitted a brief; *Mr. Jas. W. Freeman* argued the cause orally.

Messrs. Peters & Smith, for Respondent, submitted a brief; *Mr. Larue Smith* argued the cause orally.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

This is an action to enforce payment of a promissory note. [1] After issues joined by appropriate pleadings, trial resulted in a judgment in favor of the plaintiff. It appears from the record that the defendant served his proposed bill of exceptions in support of motion for a new trial upon the plaintiff within the additional time granted by the court, and that thereafter on November 14, 1918, within the time granted by stipulation, the plaintiff served upon defendant its proposed amendments to the bill; that on May 5, 1919, 172 days thereafter, the bill and amendments as proposed were first presented to the trial judge for settlement; that thereafter and before settlement (the exact date not being clear from the record) the plaintiff filed written objections to the settlement of the bill, urging violation of section 6788, Revised Codes, in support of its objection. The bill was settled May 28, 1919. Defendant's motion for a new trial was denied, and appeal is from the order denying the motion and from the judgment.

As the appeal from the order denying the motion must be disposed of by reason of a clear violation of the plain provisions of section 6788, Revised Codes, further statement of the facts becomes unnecessary. The record is wholly barren of an excuse for delay in the presentation of the proposed bill and amendments to the trial judge. Likewise it is undisclosed whether or not the proposed amendments to the bill were allowed. In the absence of an affirmative showing to excuse the delay, there is no presumption to justify it. (*Woodward v. Webster*, 20 Mont. 279, 50 Pac. 791). Con-

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fronted with this condition in the record, the unexplained delay of appellant is fatal.

“A motion for a new trial is, in this state, a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided in the statute. The losing party must pursue the requirements of the statute, or else he cannot avail himself of the remedy.” (*State ex rel. Walkerville v. District Court*, 29 Mont. 176, 74 Pac. 414; *Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.)

A full discussion of the requirements of section 6788, Revised Codes, is found in the following decisions, and leaves open to this court but one course, *viz.*, disregard the bill entirely, together with all questions sought to be presented thereby. (*Best Mfg. Co. v. Hutton*, 49 Mont. 78-88, 141 Pac. 653; *Canning v. Fried*, 48 Mont. 560, 139 Pac. 448; *Girard v. McClernan*, 39 Mont. 523, 105 Pac. 224; *State ex rel. Walkerville v. District Court*, *supra*; *Wright v. Mathews*, 28 Mont. 442, 72 Pac. 820; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Woodward v. Webster*, *supra*.)

With nothing before us but the judgment-roll, in which we find no error, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

Rehearing denied January 7, 1922.

CROWLEY ET AL., APPELLANTS, v. RORVIG, RESPONDENT.

(No. 4,481.)

(Submitted September 23, 1921. Decided November 3, 1921.)

[203 Pac. 496.]

*Real Property—Brokers—Sales Voidable, When—Public Policy.**Real Estate Broker—Sale to Self Voidable—Public Policy.*

1. A real estate broker intrusted with the privilege of selling the land of his principal, cannot sell to himself, and where he does so, the sale made by him is voidable at the option of the owner.

Same—Sale to Wife Voidable—Public Policy.

2. Where under a contract made by defendant land owner with plaintiffs (two individuals and a corporation) jointly, which authorized them to sell his property at a fixed price on a commission basis, a sale made to four persons, two of whom were the wives of the individual plaintiffs, was voidable at defendant's option, the fact that the two other purchasers bore no relation whatever to such plaintiffs not altering the rule condemning the sale.

Appeals from District Court, Broadwater County; John A. Matthews, Judge.

ACTION by M. H. Crowley and others against Nick Rorvig. From a judgment for defendant and an order refusing them a new trial, plaintiffs appeal. Affirmed.

Mr. James A. Walsh and *Mr. Frank T. Hooks*, for Appellants, submitted a brief; *Mr. Walsh* argued the cause orally.

Respondent will undoubtedly cite a long list of cases holding that an agent cannot make a contract with his wife in matters affecting the agency. These cases, commencing with the case of *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252, were based upon a rule that a wife did not have any legal existence apart from her husband, and that a husband and wife were unable to make a contract, and others will be where the husband was acting in a fiduciary capacity, exercising judgment and discretion. The broad distinction between the

1. Right of broker to purchase land listed with himself for sale, see notes in 78 Am. Dec. 211; Ann. Cas. 1912A, 202; 20 L. R. A. (n. s.) 1158.

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present case and these cases, among other things, is principally this: That the instrument creating the agency fixed the price, terms and conditions of sale. The conditions of the agency, and the price, terms and conditions of sale all came into being at the same time. It cannot, therefore, be said that the agents had any influence in fixing the price, terms and conditions of sale. It is not alleged nor was it attempted to be proven that the defendant knew who were the purchasers, or that if he did know, that he knew that Stella G. Crowley and Mary D. Crowley, two of the purchasers, were wives of M. H. Crowley and W. E. Crowley. It is a bald attempt to escape a just liability on untenable technicality.

Section 3647 of the Revised Codes provides that husband and wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried. There are no exceptions to this rule and the plain provisions of the Code cannot be repealed by a court decision.

Under the plain provisions of the Code, a husband has no interest whatever in the property of his wife. She may sell or otherwise dispose of it in any manner that she may wish, without the consent of her husband. The only restriction in the disposition of property by a married woman is that she cannot deprive her husband of more than two-thirds of it by will. But during life, she may dispose of all of it without his consent. There is no community of interest whatever with reference to the wife's separate property. It is indeed far-fetched to say that the husband may possibly have an interest in the property, that she may not dispose of it before she dies, and that she may die before he does, and therefore he would be entitled to one-third of the property.

If the wife were the agent and sold the land to her husband, there might be some reason for holding that she thereby acquired an interest in the land, because she has a dower

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interest in her husband's land, but her husband has no interest in her lands.

The question of the dealings between husband and wife is not involved in this case. The real party in interest in this case is the Logan Land Company. The authority to sell was given to the Logan Land Company. It shows that it was to M. H. and W. E. Crowley for the Logan Land Company. M. H. and W. E. Crowley were and are the managers of the company; M. H. Crowley, W. E. Crowley and Stella G. Crowley are stockholders; Stella G. Crowley is treasurer. It does not appear that she is even a director. It is not shown that Mary D. Crowley is in any way connected with the company, even as a stockholder. Hill and Burtch, two of the purchasers, are not related to the Crowleys, and are not connected with the Logan Land Company. Therefore, there is no legal reason why the Crowleys, as managers of the company should not sell this property to Hill and Burtch and to Mary D. Crowley and to Stella G. Crowley, the latter who is only a treasurer and stockholder of the corporation, and it is not shown, nor was it attempted to be shown, that she had anything to do with the management of the company. But even if she were a director, the contract would be valid.

It is not alleged, nor was it attempted to be proven that the Logan Land Company had any interest in the contract. There is no rule of law by which that company could claim any interest in the contract or in the land.

Stella G. Crowley is competent to enter into a contract in her own behalf, and having entered into a contract she is entitled to the benefit of it. (*Cuneo v. Giannini*, 40 Cal. App. 348, 180 Pac. 633; *Martinau v. Hanson*, 47 Utah, 549, 155 Pac. 432). It is not charged that the plaintiffs were guilty of any fraud, deceit or wrongdoing; hence the defendant was not in any way wronged. (*Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745; *Synnott v. Shaughnessy*, 2 Idaho, 122, 7 Pac. 82.)

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Plaintiffs had no influence in fixing price terms or conditions; the agency did not exist when the price terms and conditions were fixed by the defendant, and he alone fixed them, hence this case can be easily distinguished from cases where the agent could exercise discretion or where the principle relied upon the agent for information as to value. (*Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7; *Sacramento Bank v. Copsey*, 133 Cal. 663, 85 Am. St. Rep. 242, 66 Pac. 8, see, also, on motion for rehearing, 66 Pac. 204.)

Messrs. Gunn, Rasch & Hall, for Respondent, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

Section 5437 of the Revised Codes enjoins an agent from the doing of any act "which a trustee is forbidden to do by Article II, Chapter I of the last title," so that the authority of an agent is circumscribed by and with exactly the same limitations as that of a trustee, as found and contained in sections 5374 to 5385 of the Revised Codes. The settled rule which precludes an agent from selling the property of his principal to himself is equally applicable and controlling, as we shall presently show, where a sale is made to the agent's wife. (*Burke v. Bours*, 92 Cal. 108, 28 Pac. 57.) Nor does the fact that the price at which a sale may be made is fixed affect the relative rights and duties of the parties in the slightest particular. (4 Ruling Case Law, "Brokers," par. 25, p. 277; *Porter v. Woodruff*, 36 N. J. Eq. 174.)

Under a situation such as the one at bar, the plaintiff can neither purchase from nor sell to himself; and, what is more, he cannot so purchase from or sell to anyone who stands in such relation to him that it would place him in a position, "in which, to be honest, must be a strain on him." (*Porter v. Woodruff*, *supra*; *Reed v. Aubrey*, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 251.)

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The rule which forbids an agent selling to his wife is not based upon the proposition, asserted by plaintiffs' counsel, that the wife has no "legal existence apart from her husband," but upon the ground that the same motives of self-interest which would operate to the disadvantage of the principal where the agent sells to himself would be equally operative in the making of a sale to the agent's wife. (*Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97, 4 L. R. A. 218, 21 N. E. 193.)

The laws of Kansas confer upon a married woman exactly the same rights and powers with reference to the making of contracts and the owning and holding of property as are conferred by the laws of Montana. The question involved in the case of *Frazier v. Jeakins*, 64 Kan. 615, 57 L. R. A. 575, 68 Pac. 24, was whether a sale made by a guardian to her husband, confirmed by the probate court, should be upheld. It was held that it could not be. To the same effect are: *McNutt v. Dix*, 83 Mich. 328, 10 L. R. A. 660, 47 N. W. 212; *Chastain v. Pender*, 52 Okl. 133, 152 Pac. 833; *Hay v. Long*, 78 Wash. 616, 139 Pac. 761; *Morgan v. Hardy*, 16 Neb. 427, 20 N. W. 337; *Hammond v. Bookwalter*, 12 Ind. App. 177, 39 N. E. 872; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Dundas' Appeal*, 64 Pa. St. 325; 1 Clark & Skyles on Agency, par. 407.

The fact that two of the alleged purchasers, Hill and Burtch, are not related to the Crowleys, and are not connected with the Logan Land Company, does not make the contract a valid one. The same considerations which render the contract nugatory as to Stella G. Crowley and Mary D. Crowley render it equally invalid as to them. (*Robbins v. Butler*, 24 Ill. 387; *Tilleny v. Wolverton*, 46 Minn. 256, 48 N. W. 908; *Green v. Knoch*, 92 Mich. 26, 52 N. W. 80; *Finch v. Redding*, 154 Pa. St. 326, 26 Atl. 368; *Bedford etc. Coke Co. v. Parke County Coal Co.*, 44 Ind. App. 390, 89 N. E. 412.)

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Under the settled law of agency, as laid down in and established by the cases and authorities herein cited and referred to, the pretended sale of the defendant's property is a nullity and void.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

The facts essential to a determination of the appeals herein are that plaintiffs and defendant entered into a written agreement by the terms of which the plaintiffs engaged to sell certain lands of the defendant in Broadwater county for the fixed sum of \$40,000, for a commission of five per cent. The instrument under which plaintiffs operated was designated "authority to sell." Subsequently the plaintiffs, assuming to act as agents of the defendant, entered into an agreement with Stella G. Crowley, Mary D. Crowley, Walter H. Hill, and Gilbert Burtch (hereinafter referred to as purchasers) whereby the purchasers agreed to buy the lands of defendant according to the terms of the authority to sell. Stella G. and Mary D. Crowley are the wives of M. H. and W. E. Crowley, respectively, and Stella G. Crowley is treasurer and M. H. and W. E. Crowley president and secretary of the Logan Land Company, the corporate agent. The other purchasers are strangers. Thereafter plaintiffs tendered to defendant contracts to be executed for the sale of the land to the purchasers in pursuance of the terms of their agency. The defendant did not examine the contracts, declined to sign them, and in fact refused to comply with the "authority to sell." The purchasers were ready, able and willing to buy upon the terms specified in their agreement. This action is for recovery of \$2,000 claimed to be due as commission. Trial was had to the court with a jury, resulting in a directed verdict for defendant and judgment thereon. Motion for a new trial was denied, and appeal is from the judgment and order denying the motion.

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The evidence is in conflict as to whether or not the authority to sell was revoked before plaintiffs made the agreement with the purchasers, but that fact is of little moment here, for these appeals involve primarily the question of the validity of that contract. Hence, assuming the fact of revocation to be most favorable to plaintiffs, was the contract between the agents (plaintiffs individually and the corporation) and the purchasers (two of whom were wives of the individual agents and one an officer of the corporate agent) a valid contract under the authority to sell?

If the question here involved the integrity of a contract [1] wherein the agents themselves became the purchasers, little difficulty would be encountered in its solution. While this court has not heretofore been called upon to decide a like question, those in other jurisdictions have determined it and are substantially in accord in opposition to its validity, at the option of the principal. As illustrative of the conclusion that such a contract is voidable at the principal's option, and the reasons for the rule, we quote with approval the following from the supreme court of Nebraska: "*In Stettinische v. Lamb*, 18 Neb. 627, 26 N. W. 374, is this language: 'The rule is well settled that a party will not be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account.' This statement was sustained by several authorities cited, and of its correctness there can be no doubt. In the light of adjudged cases and of the text-books, therefore, let us see what duty the plaintiffs in error had to perform towards the defendant in error in respect of the real property which was the subject matter of the agency between them. Upon this subject the following language is found in Pom. Eq. Jur., section 959: 'In dealings without the intervention of his principal, if an agent for the purpose of selling property for the principal purchases it himself, or an agent for the purpose of buying property for the principal

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buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable. It will always be set aside at the option of the principal. The amount of consideration, the absence of undue advantage, or other similar features, are wholly immaterial. Nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts.'

"In *Porter v. Woodruff*, 36 N. J. Eq., on page 179 *et seq.*, the following language is found: 'The general interests of justice, and the safety of those who are compelled to repose confidence in others, alike demand that the courts shall always inflexibly maintain the great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer, and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires, and his 'duty to his principal demands. He is no longer the agent, but an umpire. He ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide between his principal and himself what is just and fair. The reason of the rule is apparent. Owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer; and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interest as more important, and entitled to more protection, than his own. In such cases the courts do not stop to inquire whether the agent has obtained an advantage or not, or whether his conduct has been fraudulent or not. When the fact is established that he has attempted to assume two distinct and op-

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posite characters in the same transaction, in one of which he acted for himself, and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction—whether the agent has been able so far to curb his natural greed as to take no advantage—but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed, or an unjust advantage gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed, or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it, or prove it in such a manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against the agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed, nor the capacities of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud. (*Benson v. Heathorn*, 1 Younge & C. 326; *Conkey v. Bond*, 34 Barb. 276, 36 N. Y. 427.)'

“In *Ruckman v. Bergholz*, 37 N. J. L. 440, is found the following language: ‘The judge, distinguishing this case from one where the price was left open to the negotiations of the agent, instructed the jury that, though the plaintiff was interested in the purchase when it was made, he might, nevertheless, recover his commissions as agent, notwithstanding the defendant was not aware of the existence of such

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interest. In this there was error, for it is a fundamental rule that an agent employed to sell cannot himself be a purchaser, unless he is known to his principal to be such. (Dunl. Paley, Ag. 33; Story, Ag., sec. 210; and other cases cited.) And this rule is not inapplicable, nor is it relaxed, when the employment is to sell at a fixed price, for it springs from the prohibitory policy of the law, adopted to prevent the abuse of confidence, and to remove temptation to duplicity. It requires a man to put off the character of agent when he assumes that of principal.' Mechem, Ag., in section 455, states the rule as follows: 'The agent will not be permitted to serve two masters without the intelligent consent of both. As is said by a learned judge, so careful is the law guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them, he need not show himself damnified. Whether he has been or not, is immaterial. Actual inquiry is not the principle the law proceeds upon in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he might be tempted by his own private interest to disregard that of his principal.' (Citing *People v. Township*, 11 Mich. 222.) 'This doctrine, to speak again the beautiful language of another, has its foundation, not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, "Lead us not into temptation, but deliver us from evil," and that caused the announcement of the infallible truth, "A man cannot serve two masters."'

"These quotations we shall properly close with the language of Story, Ag., section 210, quoted, with the approval of this court, in *Englehart v. Plow Co.*, 21 Neb. 48, 31 N. W. 391;

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'In this connection, also, it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is that, in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious considerations that the principal bargains in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and even if impartiality could possibly be presumed on the part of the agent, where his own interests are concerned, that is not what the principal bargains for, and in many cases it is the very last thing which would advance his interest. If, then, a seller were permitted, as an agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other, and thus a temptation, perhaps in many cases too strong for resistance by men of flexible morals, or hackneyed in the common device of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity.' '' (*Jansen v. Williams*, 36 Neb. 869, 20 L. R. A. 207, 55 N. W. 279; 4 R. C. L., sec. 25, pp. 276, 277; *Burke v. Bours*, 92 Cal. 108, 28 Pac. 57; *Reed v. Aubrey*, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022; *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97, 101, 4 L. R. A. 218, 21 N. E. 193; also, *Rodman v. Manning*, 53 Or. 336, 20 L. R. A. 1158, 99 Pac. 657, 1135; *Kingsley v. Wheeler*, 95 Minn. 360, 104 N. W. 543, 544.)

But as opposed to the rule that an agent intrusted with the privilege of selling his principal's property cannot become the purchaser, counsel for appellants rely upon *Martineau v.*

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Hanson, 47 Utah, 549, 155 Pac. 432, *Cuneo v. Giannini*, 40 Cal. App. 348, 180 Pac. 633, *Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 73 Pac. 745, and *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7, 8, 204 (two cases). Modification of the general rule, however, does not find support in these cases, but rather are they authority for a well-defined exception within which the instant case is not included. In *Martineau v. Hanson*, *supra*, the contract of agency provided that the broker might retain as his commission all he received over a specified sum net to his principal. The court said: "It should be remembered that in this case the defendant fixed his own price for the lands in question, and the plaintiff's commission was made dependent entirely upon whether he could find a purchaser who was willing and able to pay more than the price fixed by the defendant. If the plaintiff found such a purchaser, then he was entitled to whatever sum he realized for the lands in excess of defendant's price. In what way could it have affected the defendant, therefore, if it were found that the plaintiff advanced any part of the purchase price, and for doing so was given some interest in the lands, or that he obtained some interest therein as purchaser? True it is, as we have already pointed out, that if the plaintiff misrepresented the purchaser's financial ability to pay for the lands, and that he thereby misled the defendant and induced him to enter into the contract of sale, so that plaintiff might obtain the commission, and for that reason was given the note in question, he could not recover in this action. But that is entirely a different proposition from the one insisted upon by the defendant, namely, that under no circumstances may a broker be interested, either directly or indirectly with the purchaser. Under the contract of employment in this case, if the defendant received the price fixed by him for his lands, it was entirely immaterial to him how, or through what sources the purchaser obtained the money or means to pay therefor. Nor was he interested in the question of who

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purchased, except to the extent that such purchaser was financially able to pay for the lands. The question here is somewhat akin to the question passed on in *Neighbor v. Pacific Realty Assn.*, 40 Utah, 610, Ann. Cas. 1914D, 1200, 124 Pac. 523, where the exception to the general rule that a broker may not be interested in the lands purchased or sold is pointed out. So as not to be misunderstood upon the question just discussed, we repeat that the foregoing statements are based upon the express condition that the plaintiff acted in good faith, and did not, by false representations, induce the defendant to enter into a contract of sale with Mr. Earl for the purpose merely of obtaining the commission, regardless of the financial ability of said Earl to pay the purchase price." (*Martineau v. Hanson*, 47 Utah, 549, 155 Pac. 432, 434.)

The same exception is recognized in 4 R. C. L., section 25, pages 277, 278. *Herbert Kraft Co. v. Bryan*, *supra*, presents a condition wherein trustees named in a trust deed sold property of the principal to a corporation of which they were stockholders and directors. The trust deed specifically authorized the corporation to become a purchaser at the sale. The court disposed of the contention that the sale was void as follows: "The claim that the sale was void rests solely upon the naked fact that the two trustees who made the sale were stockholders and directors of the corporation, and that this fact, *ipso facto*, and without any further showing, rendered the sale void. This position is not tenable. The plaintiff occupied no fiduciary relation to the trustees, and as holder of the debt secured had, under the express terms of the deed, the right to purchase at the sale. The two trustees, being stockholders and directors of the corporation, had some relation to and interest in its affairs; but that relation does not bring the case at bar within the principle that a sale by a trustee to himself is absolutely void. The purchase was not made by or for the trustees, but by the corporation for itself, and the seller and purchaser were not the same

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person. A sale of property by a director to his corporation is not void. Moreover, the rule invoked is much relaxed as to mortgages and deeds of trust with power to sell, given as security for loans. The mortgagee himself may be the trustee to sell under the mortgage. It seems clear that a sale like the one involved in the case at bar is not void; and, if it could be considered as voidable, it could be avoided only upon the showing of some injury not here averred. As plaintiff was the highest bidder, it is difficult to see how the trustees could have refused to accept the bid without violating their duty to the trustors. However, further discussion of the point is unnecessary, because it is determined against the contention of appellant in the recent case of *Copsey v. Sacramento Bank*, 133 Cal. 665, 85 Am. St. Rep. 242, 66 Pac. 8, 205, where authorities sustaining the foregoing views are cited. We do not see how the fact that in the *Copsey Case* the debt was due originally to the corporation of which the trustees were directors can make any difference in the application of the principle." (*Herbert Kraft Co. v. Bryan*, 140 Cal. 73, 78 Pac. 745.)

In *Cuneo v. Giannini*, *supra*, the court apparently distinguishes between a "family corporation" and corporations generally, and in that case, the action of a majority of the board of directors of that family corporation, in which defendant's wife was a director, was not disturbed. The apparent confusion in the decided cases involving the question under discussion disappears under analysis, and the authorities are harmonious in holding the agent to that high degree of skill and fidelity in his principal's behalf which requires that his best efforts shall result to the advantage of his principal, thereby excluding the theory that he may occupy the inconsistent position of both seller and buyer, except in the instances herein mentioned, and vindicates the law's intolerance of any suggestions that the agent may serve two masters. (*Northwestern Nat. Bank of Great Falls v. Great Falls Opera House Co. et al.*, 23 Mont. 1, 10, 11, 57 Pac. 440.)

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But under the general rule, since the agent himself cannot [2] become the purchaser at the sale of his principal's property, may he avoid the penalty of the law by a sale to his wife? We think not. The salutary design which forms a basis for the rule in the former applies alike in the latter instance. The supreme court of Georgia elucidates the rule as follows: "The law is well settled that an agent to sell land cannot himself become the purchaser, unless the owner, with a full knowledge of all the facts, consents thereto. The principle which renders an agent incompetent to purchase from himself renders him alike incompetent to sell to his wife. As he is forbidden to purchase that which another has intrusted him to sell, for the reason that the temptation to take care of himself will override the duty he owes to his principal, it requires no great amount of reflection to perceive that he will ordinarily be influenced by the same motive in selling to his wife. It is hardly possible for a wife to make an advantageous contract of any kind without more or less benefit therefrom resulting to the husband. In this sense, as in many others, 'the twain are one flesh,' and the selfishness and desire for gain common to most mortals makes it expedient to prevent a husband and wife dealing between themselves with the property of another of which the husband has charge in a fiduciary capacity. A very strong and well-reasoned case in support of the above doctrine is that of *Tyler v. Sanborn*, 128 Ill. 136, 15 Am. St. Rep. 97, [4 L. R. A. 218, 21 N. E. 193], in which it was held that a purchase by a wife of land for the sale of which her husband was agent, with notice of his agency, will be set aside as fraudulent at the instance of his principal, who had no notice as to who was the purchaser, although there was no fraud in fact, and the wife purchased against the remonstrance of her husband, and paid for the property out of her separate estate. * * * This sale was afterward set aside at the instance of the owners, as fraudulent in law against them, although the conduct of both the agent and his wife

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was absolutely free from all fraud in fact. This decision carries the doctrine announced in the case at bar to a very considerable length, and two of the seven justices dissented; but it serves to show that the law in cases of this kind has been, and should be, very strictly enforced. The fact that in Illinois the husband is entitled to dower in the real estate of the wife undoubtedly contributed to some extent to the conclusion reached. We have no such law in Georgia, but no one can doubt that a husband has practically a beneficial, though not a legal, interest in the property of his wife. Reference is here made to the authorities cited in the case just mentioned, and also to *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 251, an examination of which will throw some light upon the question under consideration." (*Reed v. Aubrey*, 91 Ga. 435, 44 Am. St. Rep. 49, 17 S. E. 1022.)

The above quotations are an adoption of the principle enunciated by Chancellor Kent in *Davoue v. Fanning*, decided in 1816, and reported in 2 Johns. Ch. (N. Y.) 251. Kansas, with statutes commonly called emancipation statutes, similar to those of Montana, disposes of the question involving the invalidity of a sale by the agent to his wife thus: "It is true that the common-law fiction of the legal identity of the husband and wife, and the very nearly complete merger of the latter in the former, does not now have recognition. In this state, as allowed by statute, the wife may contract with her husband. They may own separate estates, free from any present claim of interest by one in the property of the other—that is, as against the other—but it is not true that as to their respective possessions they are strangers in such a sense as to take a trustee's sale by one to the other from out the operation of the rule in question. Upon the death of either of them one-half of his or her property descends under the statute to the survivor, and under the statute neither one, without the other's consent, can, by will, devise more than one-half his or her property. It is true the interest of the one in the property of the other is contingent and uncertain,

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and dependent on survivorship. It is true that the interest of the one in the land of the other is not of the character of any of the estates known to the common law, but it nevertheless possesses the elements of property. This was distinctly so ruled in *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245, and on the strength of the quality of property attaching to the inchoate interest of a wife in her husband's land she was allowed in that case to maintain an action to prevent its fraudulent alienation. However, over and beyond that property interest which husband and wife have in each other's estate, and which possesses the element of pecuniary value, there is a larger consideration. It was well expressed by counsel for defendant in error, who said: 'The affection existing between husband and wife; the marital relation, which in a sense makes them one; the implicit confidence which each must have in the other; their natural desire for each other's material prosperity; the relation which enables one to derive and enjoy personal comfort and pleasure from the property of the other, independent of the question of direct or indirect ownership in such property—are all so well recognized in law and understood by all civilized people that it would be arguing against the experience of centuries to contend that one would not be interested in the welfare of the other, and do all that could be done to enhance the pecuniary interests of the other. Therefore, by reason of the relation, no guardian could be impartial in the sale to husband or wife of the property of the ward.' '' (*Frazier v. Jeakins*, 64 Kan. 615, 57 L. R. A. 575, 68 Pac. 24.)

And hence it is to be observed that the same stamp of universal disapproval is impressed upon a sale to the wife as to the husband, as agent.

That two of the purchasers were strangers in the transaction to the selling agents, and bore no business, kindred or other relation toward them, does not alter the rule. This finds

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support in *Robbins v. Butler*, 24 Ill. 387, and *Tilleny v. Wolverton*, 46 Minn. 256, 48 N. W. 908.

The plaintiffs in this action are M. H. Crowley and W. E. Crowley, individually, and the Logan Land Company, a corporation. The complaint alleges that the defendant employed the plaintiffs (not severally but jointly) to make sale of certain lands described in the "authority to sell," and by reason thereof we are not called upon to decide the question as to whether or not the rule would be other than as herein expressed, were the Logan Land Company alone the selling agent and the only plaintiff in this action, and the contract of sale made with an officer or stockholder of that company.

Supplementing all of the foregoing discussion is section 5437, Revised Codes of our own state, which attaches certain limitations upon the powers of trustees to those of an agent, and in substance and spirit are all in accord with the views expressed herein. (Rev. Codes, secs. 5437, 5374-5385.) Hence, as our conclusion, we hold that the contracts of sale tendered by plaintiffs to defendant were voidable at his option, and that he exercised that option by refusing to execute the same.

For the reasons herein expressed, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

GREAT NORTHERN RY. CO., RESPONDENT, v. FLATHEAD
COUNTY ET AL., APPELLANTS.

(Nos. 4,530, 4,531.)

(Submitted October 26, 1921. Decided November 14, 1921.)

[202 Pac. 198.]

Taxation—Railroads—Snowsheds—Equipment of Boarding-cars—Assessable by State Board of Equalization.

Taxation—Railroad Snowsheds—Assessable by State Board of Equalization.

1. Snowsheds constructed of reinforced concrete and steel, with timber roofs, the walls of which on the mountain-side of the track were imbedded in the ground four feet or more, the outer walls consisting of a series of piers grounded in holes from a foot to twelve feet deep, *held* part of defendant railway company's roadbed, and as such assessable, under section 16, Article XII, Constitution, by the state board of equalization and not by the county assessor.

Same—Cooking Utensils on Construction Boarding-cars Assessable by State Board of Equalization.

2. Cooking utensils forming a necessary and usual equipment of cars used for boarding railway construction crews are part of its rolling stock and as such subject to assessment for taxation by the state board of equalization only.

Appeal from District Court, Flathead County; T. A. Thompson, Judge.

SEPARATE ACTIONS by the Great Northern Railway Company against Flathead County and another, tried together by stipulation. Judgment for plaintiff and defendants appeal. Affirmed.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. T. H. MacDonald*, for Appellants, submitted a brief; *Mr. L. A. Foot*, Assistant Attorney General, argued the cause orally.

Two Code sections are involved in the decision of this case: Section 2557: "The state board of equalization must assess the franchise, roadway, roadbed, and rolling-stock of all railroads operated in more than one county," and section 2511, subdivision 7, directing the county assessor to require from each person a statement of "All depots, shops, stations,

buildings, and other structures erected on the space covered by the right of way, and all other property owned by any person, corporation, or association of persons owning or operating any railroad within the county."

The latter section is the rule and the former the exception. (See *Northern Pac. Ry. Co. v. Brogan*, 52 Mont. 463, 158 Pac. 820.) "An exception to a rule cannot be enlarged beyond what the plain language imports." (*State v. Clemens*, 40 Mont. 567, 107 Pac. 896.)

"It is well settled that an exception in the statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions." (25 R. C. L. 983; *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154 [see, also, Rose's U. S. Notes]; *Arnold v. United States*, 147 U. S. 494, 37 L. Ed. 253, 13 Sup. Ct. Rep. 406; *Lima v. Lima Cemetery Assn.*, 42 Ohio St. 128, 51 Am. Rep. 809; *Olive Cemetery Co. v. Philadelphia*, 93 Pa. St. 129, 39 Am. Rep. 732; *State v. Peet*, 80 Vt. 449, 130 Am. St. Rep. 998, 14 L. R. A. (n. s.) 677, 68 Atl. 661; *Meyer v. State*, 134 Wis. 156, 14 L. R. A. (n. s.) 1061, 114 N. W. 501.)

Our statute was taken from California, and construed in *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 149 Cal. 87, 84 Pac. 775.)

The facts of the case are the snowshed in question is anchored on one side into the solid rock of the foundation, on the outside it goes down to the solid rock of the roadway; between these two walls are two lines of tracks, and between the two tracks and going down to solid ground are the supporting posts of the roof. The entire weight of the structure rests on the inside retaining wall, which goes down the solid rock and is anchored to the mountain-side. This clearly cannot be a part of the roadbed. (*Chicago, M. & St. Paul Ry. v. Murray*, 55 Mont. 162, 174 Pac. 704.)

With respect to the utensils: there is no law which we can find on that subject. The case is one of first impression and the foregoing largely applies to them.

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Mr. I. Parker Veazey, Jr., and Messrs. Noffsinger & Walchli, for Respondent, submitted a brief; *Mr. Veazey* argued the cause orally.

The present litigation arose prior to the decisions in the cases of *Chicago, M. & St. P. Ry. Co. v. Murray*, 55 Mont. 162, 174 Pac. 704, and *Northern Pac. Ry. Co. v. Dixon*, 55 Mont. 171, 174 Pac. 706, and they are controlling here. They are direct decisions that snowsheds or any other structures permanently affixed to the roadbed, as distinguished from the roadway, are part of the roadbed. No further review of the authorities is necessary, but we cite the following cases on the general subject of railroad assessment: 2 Elliott on Railroads, 2d ed., sec. 738; *Chicago, M. & St. P. Ry. Co. v. Cass County*, 8 N. D. 18, 76 N. W. 239; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Oppengard*, 18 N. D. 1, 118 N. W. 831; *People ex rel. Dunn v. Atchison, T. & S. F. Ry. Co.*, 206 Ill. 252, 68 N. E. 1059; *People ex rel. Anton v. Atchison, T. & S. F. Ry. Co.*, 225 Ill. 593, 80 N. E. 273; *Nashville etc. R. R. Co. v. Patterson*, 122 Tenn. 1, 122 S. W. 467; *St. Louis S. W. Ry. Co. v. Grayson*, 72 Ark. 119, 78 S. W. 777; *Chicago etc. Ry. Co. v. Webster County*, 101 Neb. 311, 163 N. W. 316; *Chicago, B. & Q. Ry. Co. v. Richardson County*, 61 Neb. 519, 85 N. W. 532; 26 R. C. L. 270-272; 37 Cyc. 842, 844, 1041-1043. Rolling stock has been specifically held to include the equipment and appliances of the car. (34 Cyc. 815; *Ohio & N. R. Co. v. Webber*, 96 Ill. 443; *Union Pac. Ry. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098, 5 Sup. Ct. Rep. 601.)

MR. COMMISSIONER JACKSON prepared the opinion for the court.

Great Northern Railway Company instituted two actions against Flathead county and J. W. Walker, county treasurer, to recover taxes paid under protest, which were assessed by the county assessor against certain snowsheds over its tracks

in Flathead County, and certain cooking utensils used on boarding-cars to serve its construction crews. One action was for the taxes so paid in 1917, and the other for those paid in 1918. The two actions, by stipulation, were tried together, come to this court together on appeal, and will both be disposed of in this opinion.

Plaintiff contends that the snowsheds are part and parcel of the roadbed and as such cannot be subject to local county assessment, but that they must be assessed by the state board of equalization. With respect to the cooking utensils, plaintiff holds that they are included in the term "rolling stock" and are subject to assessment in the same manner by the state board. Plaintiff also avers that, since both the roadbed and rolling stock had already been assessed by the state board and the taxes paid, the assessment and taxes sought thereon by the county assessor double the taxes on the same property. The defendants argue that the snowsheds are not included in the word "roadbed," but are to be considered as structures erected on the right of way and therefore subject to local assessment, and that cooking utensils on the boarding-cars come under the head of property properly assessable by the county assessor.

The issues were tried to the court without a jury, and judgment was had for the plaintiff in both cases. Defendants appeal from the judgments.

The record shows that the Great Northern Railway on its [1] main line, along the mountain side between Summit, Montana, and Essex, Montana, constructed snowsheds made of concrete, steel and timber, to guard against slides of snow and debris coming on the tracks. From Summit to Java, a station more than halfway to Essex, the tracks are double. The sheds are built by excavating a trench on the mountain-side of the track, four feet deep, or deeper, and cutting out the mountain wall four feet wide at the bottom. This trench is then filled with reinforced concrete and the concrete formation is continued vertically above the trench and into

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the face of the mountain wall for a distance of thirty-three feet and laterally to the natural wall of the mountain. As the result, in place of the old irregular natural wall of the mountain which has been cut away, man has faced the irregular natural wall with concrete, so that it now consists of a smooth, perpendicular, artificial wall, extending thirty-three feet above the rail and four feet or deeper below the rail; the concrete face varying in thickness and being flush with the mountain and being embedded in the mountain with mushroom anchors at twenty-foot intervals. This is the mountain-side supporting wall. The outer wall consists of pillars beyond the outer rail. Sometimes a series of piers, especially where there is a double track, runs halfway between the two tracks. These piers "are embedded in a hole in the ground, one between the tracks and the other outside the tracks, and they vary in depth from a foot to as much as twelve feet deep. A hole has to be excavated for them to find solid ground in order that they will carry the weight of the roof. This is in the roadbed." Over these two walls a timber roof is constructed and supported by them. The sheds are necessary, permanent, and their removal means their destruction.

Article XII, section 16, of the state Constitution, reads, in part: "All property shall be assessed in the manner prescribed by law except as is otherwise provided in the Constitution. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization." This method of assessment is also contained in section 2508, Revised Codes. Under subdivision 7 of section 2511, Revised Codes, the county assessor is directed to require a statement under oath of "all depots, * * * stations, buildings and other structures erected on the space covered by the right of way and all other property owned by any person, corporation or association of persons owning or operating any railroad within the county." The taxing of the snowsheds, therefore,

comes either under subdivision 7, section 2511, or under the exception set forth in the Constitution.

The Great Northern Railway operates in many counties of the state of Montana, and, if these snowsheds are included in the meaning of the word "roadbed," they are clearly to be subject to assessment and taxation under the exception to the rule, set forth in the Constitution. Fortunately, the word "roadbed" has been defined by this court as follows: "The roadbed is that part of the right of way especially prepared for the emplacement of ties, rails and other necessary superstructures, and to which the ties, rails, and other necessary superstructures are affixed." (*Chicago, M. & St. P. Ry. v. Murray*, 55 Mont. 162, 174 Pac. 704, 705.) Under this definition, it is any and all parts of the right of way especially prepared, under the tracks, over the tracks, and coterminous with the limits of the right of way, if required for the emplacement of necessary structures forming an integral part of the continuous railroad property.

The fact that the two outer walls of the sheds necessarily are on the outside of and adjacent to the very ground upon which the ties are laid cannot by the most far-fetched subtleties of reason be considered as placing them outside of the roadbed if that ground is a part of the right of way especially prepared, not only for rails and ties, but for the emplacement of a necessary structure and a superstructure is affixed to it. "Structures affixed to realty are part of the realty to which they are affixed." (*Chicago, M. & St. P. Ry. v. Murray, supra; Northern Pacific Ry. Co. v. Dixon*, 55 Mont. 171, 174 Pac. 706.)

Unquestionably the snowsheds are part of the roadbed, and under Article XII, section 16, of the Montana Constitution, are not assessable by the county assessor, but must be assessed by the state board of equalization.

Defendants have failed to pursue their contention in [2] reference to the cooking utensils, save to state that there is no law on the subject and the case is one of first impression.

This situation, under too many decisions of this court to

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require citation, should be deemed abandoned. However, it is a matter of ordinary judgment that no car has any value to a railroad, stripped of its equipment, and the same reason for assessment by the state board of equalization of the car itself applies to this equipment. As contended by counsel for plaintiff, the property is transitory and is not justly assessable at any one place where it simply happens to be on the first Monday in March, at the expense of any other place where it is also used; and this also avoids double taxation, in that the statutes of one state might fix the tax date as the first Monday in March, and another state the first Monday in April, and another the first Monday in May, *etc.* The just method is to value the cars and their equipment, running, as both do, all over the country, as a part of the operating unit. No different rule can be applied to a boarding-car for employees than is applied to a boarding-car for passengers, such as a dining-car, or to a bunk-car for employees than is applied to a sleeping-car for passengers.

“Rolling stock” is defined in 34 Cyc. 815 to be “movable property belonging to a railroad company.” From the case of *Ohio & M. R. Co. v. Webber*, 96 Ill. 443, and cited by plaintiff, is the following: “The rolling stock of a railroad company embraces the movable property belonging to the corporation by which is plainly meant such property as in its ordinary use is taken from one part of the line to another, such as cars, locomotives, and their attachments and usual accompaniments.”

Cooking utensils are a necessary and usual accompaniment of the boarding-car and as such a part of the rolling stock, and being thus included, are subject to no assessment save that by the state board of equalization.

For the reasons herein stated, we recommend that the judgments appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgments appealed from are affirmed.

Affirmed.

STATE, RESPONDENT, v. PAINE, APPELLANT.

(No. 4,879.)

(Submitted October 26, 1921. Decided November 14, 1921.)

[202 Pac. 203.]

*Criminal Law—Intoxicating Liquors—Sale—Information—Instructions.**Criminal Law—Information—Verification Unnecessary.*

1. An information charging a public offense need not be verified by the county attorney.

Intoxicating Liquors—Filing Information—Preliminary Examination of Witnesses—Statute Directory.

2. Failure of the county attorney to conduct the preliminary examination of witnesses authorized by section 12 of Chapter 143, Laws of 1917, before filing an information by leave of court, is not a ground for setting it aside, the section being directory only, and designed to extend the scope of the prosecuting officer's authority to secure evidence, not to advise the defendant of the evidence he thus obtains.

Same—Information, When Sufficient.

3. An information stating the proper title of court and cause and containing a statement of the facts constituting the offense, charged in ordinary and concise language so as to enable a person of common understanding to know what was intended, is sufficient.

Same—Purchase—Refusal of Instruction on Agency Proper, When.

4. Where defendant, on being approached by one desiring to purchase liquor, demanded and received pay therefor and thereupon by telephone instructed a third person to bring a bottle at once, who did so, handing it to the purchaser, an instruction offered by defendant on the theory that he had acted as agent for the purchaser in the transaction, *held* properly refused, an instruction on the question of agency being unwarranted by the evidence.

Appeals from District Court, Flathead County; C. W. Pomeroy, Judge.

PETER PAINE was convicted of selling intoxicating liquor, and from the judgment and order denying new trial, he appeals. Judgment and order affirmed.

Cause submitted on briefs of Counsel.

Mr. Ernest M. Child and Mr. Sidney M. Largon, for Appellant.

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Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, for Respondent.

Defendant in a criminal action cannot submit his defense to a jury through instructions of the court unless he first offers some evidence on which such instructions may be based. To rule otherwise would deprive the state of all opportunity of rebutting his defense. He could merely sit still, as he did in the instant case, allow the state to submit all its evidence, and then, no matter how complete and convincing a case the state had made out, submit, through instructions to the jury, his defense without giving the state an opportunity of cross-examining his witnesses or offering rebutting testimony.

The case of *Mo Yaen v. State*, 18 Ariz. 491, L. R. A. 1917D, 1014, 163 Pac. 135, held that one procuring intoxicating liquors for another is guilty of an unlawful sale where the statute provides that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid or abet in its commission, are principals, and the law of agency as applied in civil cases has no application in criminal cases. Thus under section 9167, Revised Codes, under the above rule, appellant becomes liable as a principal in the offense. This rule is sustained by the following cases: (*Woods v. State*, 114 Ark. 391, 170 S. W. 79; *Pope v. State*, 108 Miss. 706, 67 South. 177; *Buchanan v. State*, 4 Okl. Cr. 645, 36 L. R. A. (n. s.) 83, 112 Pac. 32; *Kendrick v. State*, 11 Okl. Cr. 380, 146 Pac. 727; *State v. Gear*, 72 Or. 501, 143 Pac. 890; *Johnson v. State*, 172 Ala. 424, Ann. Cas. 1913E, 298, 55 South. 226; *Boyd v. State*, 3 Ala. App. 178, 57 South. 1019.) Had appellant offered testimony to show that he was merely acting as agent for Greer in the purchase of the whiskey, he might then have been entitled to ask for the instruction, but he was certainly not entitled to it on the uncontradicted evidence of the state.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of selling intoxicating liquors, and appealed from the judgment and from an order denying him a new trial.

1. It is contended that the guaranty contained in section 7, [1] Article III, of the Constitution was violated in this: That the information was not verified by the county attorney. The question was determined adversely to defendant, and further discussion foreclosed by this court, in *State v. Clancy*, 20 Mont. 498, 52 Pac. 267, and that case has been followed and approved in *State v. Shafer*, 26 Mont. 11, 66 Pac. 463, and in *State v. Martin*, 29 Mont. 273, 74 Pac. 725.

2. It is insisted that the information should have been set [2] aside upon the motion of defendant because neither the prosecuting officer nor a magistrate took the testimony of witnesses relating to the alleged offense before the information was filed, and section 12, Chapter 143, Laws of 1917, is cited in support of this contention. The section does not relate to matters of pleading, and does not purport to amend section 9193, Revised Codes. Its terms disclose that it was the legislative intention thereby to extend the scope of the prosecuting officer's authority in securing evidence of alleged violations of the prohibition law by empowering him to issue subpoenas, and conduct an *ex parte* examination of witnesses, or, in the alternative, to submit the matter to a justice of the peace and secure the examination before that officer. In other words, the purpose of the section is to advise the prosecuting officer, not the violators of the law; but it is directory only, not mandatory, and if the necessary evidence is obtainable otherwise, an information may be filed upon leave of court first obtained, as was done in this instance. Furthermore, the failure of the county attorney to conduct such examination is not a ground for setting aside an information. (Sec. 9193, above; *State v. Bowser*, 21 Mont. 133, 53 Pac. 180.)

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3. The information is not a model pleading, but it does give [3] the title of the cause, the proper designation of the court in which it was filed, the names of the parties, and contains a statement of the facts constituting the offense charged in ordinary and concise language in such manner as to enable a person of common understanding to know what was intended, and is sufficient. (Sec. 9147, Rev. Codes.)

4. The testimony is very brief, but it is ample to sustain the verdict. John A. Greer was the principal witness for the state. He testified that on the morning of December 8, 1920, he went into defendant's place of business at Whitefish; that defendant was behind the counter; that the witness asked defendant if he (Greer) could get a bottle of whiskey, telling defendant that he had secured one there the day before; that defendant asked him what kind he had secured, and witness replied "Imperial," and that he paid \$12 for it; that defendant then demanded the money, and witness handed him \$15 in currency, which defendant deposited in the cash register, and returned to witness \$3 in change; that defendant went to his telephone and called the "Whitefish Second-hand Store," and asked for "Jake," and over the telephone inquired, "Have you any Imperial?" and then said, "Bring one down right away"; that within a few minutes a person, identified as Jake Carter, entered at the back door of defendant's place of business, and started toward the front, but was signaled back by defendant; that the witness went to the toilet, and Carter inquired, "Is this for you?" and, upon receiving an affirmative answer, delivered to the witness a bottle containing whiskey. The other evidence need not be considered.

Counsel for defendant insist that they proceeded throughout [4] the trial upon the theory that defendant acted only as agent for Greer in purchasing the liquor, and upon that theory requested the court to give the following instruction: "You are instructed that under the laws of the state of Montana it is not unlawful to purchase intoxicating liquor, and you are further instructed that what a person may do himself, he

may do by an agent, and if you find in this case that the defendant acted as the agent of the witness Greer in purchasing the liquor, if you find that liquor was purchased and without any profit, recompense, or remuneration to himself, then you will find the defendant 'not guilty.' '' The request was refused, and error is predicated upon the ruling. We will not stop to consider whether the proposed instruction correctly states an abstract rule of law; it is sufficient to say that in our judgment there is not anything in the evidence to justify submitting to the jury the question of agency.

The other assignments do not merit special consideration. We do not find any errors in the record. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, GALEN and REYNOLDS concur.

MARCELLUS, RESPONDENT, v. WRIGHT ET AL., APPELLANTS.

(No. 4,878.)

(Submitted September 26, 1921. Decided November 14, 1921.)

[202 Pac. 381.]

District Judges—Term of Office—Expiration of Term—Invalidity of Subsequent Acts—Jurisdiction—Office and Officers.

District Judges—Term of Office—Expiration—Subsequent Acts Invalid.

1. Where the term of a district judge expired at midnight on December 31, 1920, the day preceding the first Monday in January following the general election at which his successor had been elected, an order denying a motion for a new trial, made by him on December 31 but which he was prevented from lodging with the clerk because, when attempting to do so, he found the office closed for the day, handed by him to the clerk on January 3, 1921, with direction to enter it as of December 31, was his personal act and void, he then no longer being vested with judicial authority.

Office and Officers—Authority Ceases upon Expiration of Term.

2. When the duration of the term of office is specified in the statute, and an officer is elected to serve out the term, his power and

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authority thereupon *ipso facto* cease, unless he is authorized by some specific provision of organic law to hold over.

Same—Terms—Statutes—Construction.

3. If the language of a statute specifying the term of office of an official is ambiguous, the interpretation which limits the term to the shortest time should be adopted.

Same—Term of Office—"Until"—Definition.

4. The word "until" within statutes fixing terms of office, is a restrictive word, and is of limitation; its office being to fix some point of time upon the arrival of which what precedes will cease to exist.

District Courts—May Correct Minutes.

5. The district court may correct its minutes to speak the truth.

Same—Correcting Minutes—Consideration of Affidavits Proper.

6. On motion to annul an order denying a new trial on the ground that it was made by the judge after expiration of his term of office, his successor, in deciding whether his predecessor made the order after his term had expired, was not limited to the minutes of the court, but could consider the facts disclosed by the affidavits filed in support of and in opposition to the motion.

Officers—*De facto* and *De Jure*.

7. Where an officer *de jure* is in possession, no other person can be an officer *de facto*, with respect to that office, so as to render an act of the latter officially valid.

Appeal from District Court, Fergus County; Rudolph Von Tobel, Judge.

ACTION by Mary A. Marcellus against Frank E. Wright and others. From an order annulling an order overruling motion for new trial, the defendants appeal. Affirmed.

Mr. Sidney Sanner and *Messrs. Belden & De Kalb*, for Appellants, submitted a brief; *Mr. Sanner* argued the cause orally.

The record is barren of any justification for the order in question. On the face of the record the situation here presented has no exact precedent and few analogies. Certified by the judge who made the order appealed from as "containing all the evidence submitted and considered by the court in the making of said ruling," the record shows the bald fact—and nothing more—that, because one of the judges of the tenth judicial district court, on a certain date, by formal opinion and order, denied a motion for new trial duly submitted to him for decision, but did not file that order or procure a minute entry thereof to be made until the third day thereafter, another

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judge of the same court who never had cognizance of the cause claims and assumes to exercise the authority to strike that order from the files and to annul the minute entry of the same.

Confessedly, Judge Briscoe, at the time respondent's motion for new trial was submitted to him, was a judge of the district court of Fergus county, and presumptively he was such judge when he denied the motion. His act was the act of the court; through him the court had functioned, and no authority short of this court could review or disturb his act. Authorities are not necessary to sustain propositions so elementary, but see: *State ex rel. Little v. District Court*, 49 Mont. 158, 141 Pac. 151; Spelling on New Trial and Appeal, sec. 27.

It will doubtless be suggested, however, that the district court judicially knew and that this court judicially knows that Judge Briscoe had ceased to be a judge of the tenth judicial district court at the time his order denying respondent's motion for new trial was filed by the clerk, to-wit, at 9:15 A. M. of January 3, 1921. If the court knew any such thing there is nothing in the record to show it, but the clear implication of the record is that no such consideration was taken into account in making the ruling. Doubtless under Section 7888, Revised Codes, this court knows that the tenth judicial district has two district judges; that Honorable Jack Briscoe was one of these; and that Honorable Roy E. Ayers and Honorable Rudolph Von Tobel are now such judges; but either of these officials could have deferred his accession until after the first Monday (or third day) of January, 1921, in which event it was the duty of Judge Briscoe to remain as *locum tenens* until his successor had indeed succeeded. (Rev. Codes, sec. 355; *State v. Foster*, 39 Mont. 583, 104 Pac. 860; *State v. Page*, 20 Mont. 238, 50 Pac. 719.) And in that event he was judge *de facto*, whose acts were valid so far as we are here concerned. (Rev. Codes, sec. 8177; *State v. Foster, supra*; *Carli v. Rhener*, 27 Minn. 292, 7 N. W. 139; *Humel v. Hoogendorn*, 5 Alaska, 25; *Cromer v. Boinest*, 27 S. C. 436, 3 S. E. 849; *Oppenheim v. Pittsburgh*

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Ry. Co., 85 Ind. 471; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 211; *Adams v. Mississippi State Bank*, 75 Miss. 701, 23 South. 395; *Hamlin v. Kassafer*, 15 Or. 456, 3 Am. St. Rep. 176, 15 Pac. 778; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *Woodside v. Wagg*, 71 Me. 207.)

What the facts were with respect to the actual accession of a successor to Judge Briscoe the record does not disclose. It does not answer to say the lower court knew: There are things of which the lower court may have judicial knowledge but of which this court, unless that knowledge be in some manner brought into the record, must remain ignorant; as for instance, provisions of the rules of the lower court (*Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739); the division of jurisdiction among the judges thereof (*Fenn v. Reber*, 153 Mo. App. 219, 132 S. W. 627); or the local conditions, however notorious, under which it functions (*Detroit Ry. Co. v. Crane*, 50 Mich. 182, 15 N. W. 73; *McCorkle v. Driskell* (Tenn.), 60 S. W. 172); and the circumstances necessarily here involved are of like character.

On the face of the record the order of Judge Briscoe was made, filed and entered on the minutes December 31, 1920. The correctness of this record was assailed by affidavit, and the ultimate ruling rests upon affidavit evidence alone. The minute entry whenever it was made, correctly stated the fact that respondent's motion for new trial had been overruled on December 31, 1920, and the lower court should have disregarded all affidavit evidence to the contrary. (*State ex rel. Brown v. District Court*, 55 Mont. 158, 174 Pac. 601.)

This jurisdiction has long been familiar with the rule that a minute entry directing judgment to be entered is not a judgment, that the recordation of the judgment is not the judgment, but that the judgment is the decision of the court finally disposing of the case. It is quite true that in the case of a judgment, and for the purposes, as, for instance, appeal, the entry is necessary, but the judgment is rendered when the court or

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judge has given final decision. (*Lisker v. O'Rourke*, 28 Mont. 129, 72 Pac. 416, 755; *Butte & M. Co. v. Montana, O. P. Co.*, 27 Mont. 152, 69 Pac. 714.) To a stronger degree in the case of an order, there is a clear distinction between the making of an order and its entry. The order is made when the court announces it. It is entered when it is placed of record by the clerk. (*State v. Bowser*, 21 Mont. 133, 53 Pac. 179; 20 Ruling Case Law, 512.) And with reference to orders similar or more exacting than the one now before this court, it has been repeatedly declared that an order in writing is made when it is signed by the judge. (*Niles v. Edwards*, 95 Cal. 41, 47, 30 Pac. 134; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Holt v. Holt*, 107 Cal. 258, 40 Pac. 390; *Roberts v. White*, 7 Jones & S. (N. Y.) 272.)

That, under statutory conditions similar to ours, the filing of the order has exactly the same effect as its entry upon the minutes, that neither need be done at any particular time, and that it is no more fatal to the order, if made, that it was not filed before the expiration of the judge's term than that it was not entered on the minutes until after such expiration, has also been judicially declared. (*Von Schmidt v. Widber*, 99 Cal. 514, 515, 34 Pac. 109.)

The same rule is applied to orders, including orders upon motion for new trial, in the following cases: *State v. Bowser*, 21 Mont. 133, 53 Pac. 179; *Bartolet v. Faust*, 5 Phila. (Pa.) 316; *Storrie v. Shaw*, 96 Tex. 618, 75 S. W. 20; *Babcock v. Wolf*, 70 Iowa, 676, 28 N. W. 490; *Von Schmidt v. Widber*, 99 Cal. 511, 517, 34 Pac. 109; *Manneck Mfg. Co. v. Smith etc. Mfg. Co.*, 2 City Ct. Rep. (N. Y.) 37; *Reed v. Higgins*, 86 Ind. 143; *Bauman v. New York Cent. etc. Ry. Co.*, 10 How. Pr. (N. Y.) 218; *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 259; *Davis v. Shaver*, 61 N. C. 18, 91 Am. Dec. 92; *Roberts v. Wessinger*, 69 S. C. 283, 48 S. E. 248; *Rushton v. Woodham*, 68 S. C. 110, 46 S. E. 943.

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Mr. Ralph J. Anderson and *Messrs. Wheeler & Baldwin*, for Respondent, submitted a brief; *Mr. Anderson* and *Mr. James H. Baldwin* argued the cause orally.

The purported order denying respondent's motion for new trial was made without jurisdiction. The fault in appellants' argument is based upon a failure to distinguish between the authority of the trial court and a judge thereof, an indiscriminate and improper use of the words "court" and "judge," and a failure to view the admitted facts in the light of the provisions of the Constitution and statutes of this state.

Under the provisions of our Constitution there is a well-defined distinction between a particular district court and the judges of that court. (*State ex rel. Grissom v. Justice Court*, 31 Mont. 258, 78 Pac. 498.) Their effect is to command all things requiring judicial action to be done by the court except in so far as it is otherwise expressly provided by the Constitution, and to prohibit the exercise of any judicial power by any officer or person unless the authority so to do is expressly given by the Constitution. (*Eustance v. Francis*, 52 Mont. 295, 157 Pac. 573.) As the right to rule on a motion for new trial is not given by the Constitution of this state to the judge of a district court, it follows that Judge Briscoe was entirely without authority, at chambers, to rule on respondent's motion for new trial. (Sec. 6290, Rev. Codes; *Eustance v. Francis*, *supra*; *McIntyre v. Northern Pac. Ry.*, 58 Mont. 256, 191 Pac. 1065.)

Sections 6314 and 6319, Revised Codes, define the powers of a judge at chambers, and it is settled law in this state that his powers at chambers in cases pending in the court of which he is a judge are limited to the disposition of proceedings enumerated in section 6314 and may not be extended to others not enumerated. (*State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753; *McIntyre v. Northern Pacific Ry. Co.*, *Eustance v. Francis*, *supra*.)

A motion for a new trial is a statutory remedy and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes; and this rule applies

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indifferently to law and equity cases. (*Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920; *State v. District Court*, 49 Mont. 595, 144 Pac. 159; *State v. Kelley*, 57 Mont. 123, 187 Pac. 637.) The application for a new trial must be made to the court in which the case was tried. (29 Cyc. 922; 14 Ency. Pl. & Pr. 902.) Ordinarily, the application should be heard and determined by the judge who presided at the trial. (29 Cyc. 922.) Nevertheless, unless it is otherwise provided by statute, it may be heard by any judge of the same court. (29 Cyc. 923.) There is no statute in this state requiring that the judge who tried the case shall sit on the hearing of the motion for new trial. And this court has held specifically that in this state a party has no absolute right to have a motion for new trial passed upon by the judge who tried the case. (*Hill v. Nelson Coal Co.*, 40 Mont. 1, 104 Pac. 876; *State v. District Court*, 33 Mont. 138, 8 Ann. Cas. 752, 82 Pac. 789.) A judge at chambers has no power to pass upon such a motion. (23 Cyc. 552; 4 Ency. Pl. & Pr. 348; *Hodgin v. Whitcourt*, 51 Neb. 617, 71 N. W. 314; *Accousi v. G. A. Stowers etc. Co.* (Tex. Civ. App.), 83 S. W. 1104; *Donly v. Fort*, 42 S. C. 200, 20 S. E. 51.) And surely a motion for new trial cannot be passed upon by a judge whose term of office has expired. (29 Cyc. 923.)

It would seem that any argument as to whether this court knows judicially that Judge Briscoe was out of office on Monday, January 3, 1921, is unnecessary; however, as appellant seems to place great stress upon this point, we offer for the consideration of the court authorities which seem conclusively to sustain the position that this court must take judicial notice of who were the judges of the trial court on that day. (15 R. C. L., p. 1106, sec. 37; 23 C. J., pp. 105, 106; *Vahle v. Brackenseik*, 145 Ill. 231, 34 N. E. 324; *Gross v. Wood*, 117 Md. 362, Ann. Cas. 1914A, 30-33, and note, 83 Atl. 337; *People v. Ebanks*, 120 Cal. 626, 52 Pac. 1078; *Kurtz v. Cutler*, 178 Cal. 178, 172 Pac. 590; *Apple v. Ellis*, 50 Okl. 80, 150 Pac. 1057; *Coburn v. Thornton*, 30 Idaho, 347, 164 Pac. 1012; *Board of Commissioners v. Shaffner*, 10 Wyo. 181, 68 Pac. 14.) As a

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result the trial court knew and this court knows judicially that Judge Briscoe had ceased to be judge of the trial court prior to Monday, January 3, 1921, and that on that day he was entirely without authority to make any order of any kind in any case pending in the court over which he formerly presided. (*Broder v. Conklin*, 98 Cal. 360, 33 Pac. 212; *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60; *Schultz v. Winter*, 7 Nev. 130.)

The act of the clerk of the court on Monday, January 3, 1921, in filing the order as of December 31, 1920, and making the entry in the minutes as of that day, was entirely without authority and cannot give vitality to the purported order denying respondent's motion for new trial. A judge out of office is entirely without authority to make an order directing the filing or entry of any order *nunc pro tunc*. (*Accausi v. G. A. Showers etc. Co.* (Tex. Civ. App.), 83 S. W. 1104.) Where the court has omitted to make an order, which it might or ought to have made, it cannot afterward be entered *nunc pro tunc*. (29 Cyc. 1516; *Talbot v. Mack*, 41 Nev. 245, 169 Pac. 25; *Board of Control v. Mulertz*, 60 Colo. 468, 154 Pac. 742; *White v. East Side Lumber Co.*, 84 Or. 224, 161 Pac. 969, 164 Pac. 736; *Klein v. Southern Pac. Co.*, 140 Fed. 213; *Southern Pacific Co. v. Pender*, 14 Ariz. 573, 134 Pac. 289; *Chester v. Graves*, 159 Ky. 244, 166 S. W. 998.)

The trial court acted properly in granting respondent's motion. The order and entry made in the minutes of the court were made without jurisdiction and it was incumbent upon the trial court to purge the records of the same. (*Soliri v. Fasso*, 56 Mont. 400, 185 Pac. 322; *State ex rel. Smith v. District Court*, 55 Mont. 602, 179 Pac. 831; *Crawford v. Pierse*, 56 Mont. 371, 185 Pac. 315; *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753.)

MR. JUSTICE COOPER delivered the opinion of the court.

This action was commenced in the district court of Fergus county in and for the tenth judicial district. It was tried by

the court without a jury. Upon findings of fact and conclusions of law, the court entered judgment in favor of the [1] defendants. On March 23, 1920, respondent filed her motion for a new trial, which was later argued, submitted, and by the court taken under advisement. By a writing entitled "Opinion on Motion for a New Trial" the court stated its reasons for refusing the motion, and ended with the declaration that a new trial was denied. While the memorandum bears date December 31, 1920, it was not filed by the clerk nor entered in the minutes until 9:15 o'clock Monday morning, January 3, 1921. On January 10 motion was made to strike the document from the files and to cancel its recordation on the ground that it was an attempt upon the part of the former judge to make judicial pronouncement of an order after his term of office had expired. On the same day there was filed, in support of the motion, an affidavit of the clerk of the court, setting forth the following facts: That on January 3, 1921, at 9:15 A. M., Honorable Jack Briscoe handed to him an order denying plaintiff's motion for a new trial, directed him to enter and file the same as of the date of December 31, 1920, and to make a minute entry on the records of Department No. 2 of the court denying the motion for a new trial as of the date of December 31, 1920; that pursuant to such direction, affiant made the entry as of date of December 31, and filed and entered the order denying the motion for new trial as of the date stated. On January 18, 1921, an affidavit of Honorable Jack Briscoe was filed, reading as follows: "That as one of the judges of the tenth judicial district of the state of Montana, in and for the county of Fergus, and the judge of Department 2 thereof, he tried the above-entitled action on its merits, and made findings of fact and conclusions of law therein in favor of the defendants and against the plaintiff; that the plaintiff then presented her motion for a new trial of said cause, and after argument of the respective counsel the motion for new trial was taken under advisement by the court; that on the thirty-first day of December, 1920, affiant as such judge de-

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terminated the said motion by overruling the same, and the court dictated and signed a memorandum opinion to that effect, which concludes, 'The motion for a new trial is overruled'; that on a memorandum sheet among other matters requiring disposition at the hands of the court, affiant had set down the title of court or some reference to the above-entitled case and had written thereon a notation to hand to the clerk of the court to the same effect; that about the hour of 5 o'clock (5) P. M., or shortly after that time, affiant took the said opinion and the said memorandum to the office of the clerk of court, but, finding the office locked and the clerk gone, concluded it would be just as well to hand it to the clerk the following day, January 1, 1921; that on the following day and on the second day of January, 1921, affiant did not find the clerk of court at his office, and he then handed the same to the clerk of court shortly after the office of the clerk of court had opened on the morning of the third day of January, 1921." On February 10, 1921, upon the record thus made, the court, presided over by Honorable Rudolph Von Tobel, elected to take the place of Honorable Jack Briscoe, and annulled the purported order. The defendants appeal from the order thus made.

We shall treat the proceeding as one to correct and purge the record by amendment of the order of Judge Briscoe refusing plaintiff a new trial. Was the direction to the clerk to enter the order the personal act of Judge Briscoe after he had lost judicial power by the lapse of his term as judge, or was it the judicial pronouncement of the court?

On the fifteenth day of February, 1917, there was but one district judge of the tenth judicial district. On that day an Act passed by the legislative assembly authorized the governor to appoint an additional judge for that district "to hold his office until the first Monday of January, 1919, or until his successor is duly elected and qualified." (Laws 1917, Chap. 35.) Pursuant thereto, on March 2 of that year, the governor appointed Honorable H. L. De Kalb to fill the office thus created. He resigned May 18, 1918. On November 5, 1918,

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Honorable Jack Briscoe was elected to serve until the next general election. On November 9, 1918, he was appointed by the governor to serve until the term for which he was elected commenced.

In *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932, the relator was appointed an additional judge for the fourth judicial district under the Act approved February 11, 1913. He claimed, among other things, that inasmuch as the commission issued to him stated that he was to hold the office until the first Monday in January, 1917, he was entitled to hold until that date, regardless of the fact that a general election, at which he was defeated for election by Honorable Theo. Lentz, had intervened between the two dates mentioned. The provisions of the Constitution and the law upon the subject are there given critical and exhaustive analysis by Chief Justice Brantly in behalf of this court. He proceeds: "Section 12 of Article VIII [of the Constitution] was considered in connection with other provisions of the Constitution, in *State ex rel. Jones v. Foster*, cited above [39 Mont. 583, 104 Pac. 860]. It was there said: 'In adopting it, the convention had three purposes in view: (1) To provide for the division of the state into districts; (2) to provide for district judges and to fix their term of office; and (3), by way of exception, to fix the term of office of those first elected, so that they would hold until the general election in 1892, and until their successors should be elected and qualified. But for the exception, those first elected would also have held for the term of four years. The purpose of it was to so adjust the term of those first elected that thereafter the election would fall regularly upon presidential years and be uniform throughout the state.' It was also held that the clause, 'and until their successors are elected and qualified,' is a part of the exception, and does not modify the clause definitely fixing the term of the judges to be subsequently elected. The result is that, upon the expiration of the four-year term, the office of district judge becomes vacant by operation of law."

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A provision in the Constitution of California reading, "The terms of such officers [district judges] shall commence on the first Monday of January next following their election," was given a like interpretation by the supreme court of that state, in *People ex rel. Bledsoe v. Campbell*, 138 Cal. 11, 70 Pac. 918, *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732, *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211, and *Connolly v. Ashworth*, 98 Cal. 205, 33 Pac. 60. The first case is cited with approval in both the *Foster* and the *Lentz Cases*, and all of them are in complete accord upon the proposition. The two cases last cited hold emphatically that an act performed by a person whose term of office as district judge has expired is void and should be set aside.

From these authorities it is clear that the term for which Judge Briscoe was elected was definitely fixed, and as definitely limited to the last minute of the day next preceding the first Monday in January following the general election at which his successor was elected. This is so because the law will not tolerate the thought that the tenure of office can begin or end at a time other than that fixed by the authority creating the office, or in any manner other than that so provided. When [2] the duration of the term is specified in the statute, and an officer is elected to serve out the term, his power and authority thereupon *ipso facto* cease, unless he is authorized by some specific provision of organic law to hold over. (See *People v. Tieman*, 30 Barb. (N. Y.) 193; *Badger v. United States*, 93 U. S. 599, 23 L. Ed. 991 [see, also, Rose's U. S. Notes]; *Mechem on Public Officers*, sec. 396, and cases cited.)

Where the latter words are omitted, there is no right by which the incumbent can hold over the next general election, because the law favors the requirement that all officers, whenever possible, shall be elected by the people. (*State ex rel. Patterson v. Lentz, supra.*) This is evinced by the care exercised by all legislative bodies to guard against lapses, where holding over is not deemed necessary or desirable for the public good. "Hence the provisions fixing the terms of judicial officers

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must be held to be exclusive, with the result that vacancies occur by operation of law upon the expiration of the terms designated." (*State ex rel. Jones v. Foster, supra; State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94.) If the language employed were of doubtful meaning, that interpretation [3] which limits the term to the shortest time should be adopted. (*Mechem on Public Offices and Officers*, sec. 390; *Wright v. Adams*, 45 Tex. 134; *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652.)

A careful reading of the entire Constitution reveals the remarkable fact that the declaration found in section 12 of Article VIII, prescribing that "the terms of district judges shall be four years" is all that is said in that instrument upon the subject. To reach a conclusion which satisfies the judicial mind and responds directly to the will of the convention, the Constitution and the ordinances attached to the former must be carefully examined for words best fitted to furnish the needed light. The provisions of section 7 of the same Article, fixing the terms of the members of this court, present an analogy of some service in solving the problem. It reads: "The term of office of the justices of the supreme court, except in this Constitution otherwise provided, shall be six years." Then, in the next section, which provides the time to choose those first to be elected, will be found these words: "At [the] first election the Chief Justice shall be elected to hold his office until the general election in the year one thousand eight hundred and ninety-two (1892), and one of the associate justices to hold office until the general election in the year one thousand eight hundred and ninety-four (1894); and the other associate justice to hold his office until the general election in the year one thousand eight hundred and ninety-six (1896), and each shall hold until his successor is elected and qualified."

It will be noted that in each of the instances above, the word [4] "until" is used with the evident purpose of limiting each term to a definite period of time; and, bearing in mind the

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exigencies always to be apprehended from defective election machinery, and public inconvenience attending vacancies in public office, there was added the following: "And each shall hold until his successor is elected and qualified." In section 9 of the same Article, too, we find the same exactness of expression in fixing the term of the clerk of this court, and the point in time and circumstance to which he should hold office. As further evidence plainly visible, the terms for which all state officers, except judicial officers, shall hold are limited in section 1 of the same Article VIII to four years, "beginning on the first Monday in January next succeeding" the general election following. While that section does not affect judicial officers, the language does serve to make all the other elective officers of the state begin their official duties at the same instant. So that, the words employed in section 6 of Ordinance No. 2, that "the terms of officers so elected shall begin when the state is admitted into the Union, and shall end on the first Monday in January, 1893," affect neither the intent nor object apparent throughout the Constitution and the ordinances to bring to a close the terms of district judges at 12 o'clock midnight preceding the first Monday in January following the election in presidential years. This construction makes complete harmony in the matter of the beginning and ending of the terms of all the state officers, without in the least shading the meaning of any of the language contained in either enactment.

The statute providing for an additional district judge in the tenth judicial district, and declaring that the appointee of the governor shall hold "until the first Monday in January, 1919," is entitled to respectful consideration by the courts. (*Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386; *State ex rel. Patterson v. Lentz*, *supra*.) And unless the time fixed by statute is so plainly at odds with that prescribed in the Constitution as to be wholly inconsistent with it, it is the duty of the court to give it such a construction as will enable it to have effect. Or to go a little further, when the conflict between the Act and the Constitution is not clear, the implication must

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always be that no excess of authority has been intended by the legislature, and that the seeming differences can be reconciled. The court will not go beyond the face of the law to seek grounds for holding it unconstitutional. (Cooley's Constitutional Limitations, p. 225; *Stevenson v. Colgan*, 91 Cal. 649, 25 Am. St. Rep. 230, 14 L. R. A. 459, 27 Pac. 1089.) Thus, it seems, if we are at liberty to rely with any degree of confidence upon the legislative intent, the consideration is by no means all upon the side of the appellant. The word "until" is a restrictive word, and is of limitation, in its ordinary and usual sense; and this is the meaning which should now be ascribed to it. "Its office is to fix some point of time or some event upon the arrival or occurrence of which what precedes will cease to exist." (*State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 588, 144 Pac. 162.)

Counsel for appellant earnestly insist that the affidavits [5, 6] should not be considered for the reason that the minutes of the court furnish the only competent evidence respecting the regularity and validity of the order appealed from. With this we cannot agree, for reasons which we will now proceed to give. In the first place, it was competent for the court to correct the minutes to speak the truth; and it was competent for it to consider the affidavits disclosing the actual facts. Second, upon appeals to this court the presumption must always be indulged that the action of the district court proceeded, not only according to law, but that it was done in the regular mode. Section 7962 of the Revised Codes provides that all presumptions, other than those expressly made conclusive by statute, are satisfactory if uncontradicted; that they are denominated disputable presumptions which may be controverted by evidence. By subdivision 15 it is presumed "that official duty has been regularly performed, and, 16, that a court or judge, acting as such, whether in this state, or any other state or county, was acting in the lawful exercise of his jurisdiction." If we are to ascribe any force at all to these statutory presumptions, we may assume that Judge Von Tobel knew, both personally and

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judicially, when he took office on the morning of January 3, 1921, that no entry denying the new trial was then in the minutes of Department No. 2 of the court, and that he had a right to base his ruling upon information so acquired. In this situation, therefore, we may not assume that the district court relied solely upon the affidavits in making the order in question. (*Ming v. Truett*, 1 Mont. 322.)

The affidavits are proof conclusive that the direction to the clerk was the personal act of Honorable Jack Briscoe because the lapse of his term of office had divested him of all judicial authority. (*Dalton v. Loughlin*, 4 Abb. N. C. (N. Y.) 187; *Connolly v. Ashworth*, *supra*; *Broder v. Conklin*, *supra*.)

Taking another step, counsel insist that the order to the clerk was the act of a judge *de facto*, and the absence of a showing [7] upon the record that Judge Von Tobel was actually present and performing the duties of judge of the court at 9:15 on the morning of January 3, 1921, is enough to render the act valid and unimpeachable. The fault in this argument lies in the fact that it ignores the usual presumption that Judge Von Tobel rightfully assumed that there could be no judge *de facto* while he was a judge *de jure*.

In Throop on Public Officers and Offices, section 641, the law is stated thus: "If the officer *de jure* is in possession—if he is officer *de jure* and also officer *de facto*—no other person can be an officer *de facto* with respect to that office; nor can two persons be officers *de facto* at the same time. There cannot be two incumbents at once; if one is in, the other is not." (*Hamline v. Kassafer*, 15 Or. 458, 3 Am. St. Rep. 176, 15 Pac. 778; *McCahon v. Commissioners*, 8 Kan. 442; *Boardman v. Halliday*, 10 Paige (N. Y.), 223; *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 80; *Jewett v. McConnell*, 112 Ark. 291, 165 S. W. 954; *United States v. Alexander* (D. C.), 46 Fed. 728.)

The last cited case involved the validity of an order identical with the one before us. In reaching a conclusion fatal to its validity, the court made use of the following remarks: "Courts have sustained the acts of *de facto* officers only as a matter

of necessity, to avoid serious damage to those not at fault; but the encouragement of a careless practice on this subject would result in far greater injury than benefit. Rather is it better that it be understood that the acts and orders of those without the legal right to exercise official trust pass the ordeal of the closest scrutiny, and be ratified only so far as justified by public policy and necessity."

For these reasons, the order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur in the result.

HOFFMAN, RESPONDENT, v. ROEHL ET AL., APPELLANTS.

(No. 4,445.)

(Submitted September 17, 1921. Decided November 14, 1921.)

[203 Pac. 349.]

Personal Injuries—Master and Servant—Respondeat Superior—Automobiles—Scope of Employment.

Master and Servant—*Respondeat Superior*—Automobiles—Injury to Pedestrian—Scope of Employment.

1. Where an automobile dealer's chauffeur, demonstrating a car for his employer, acceded to the request of the prospective buyer and permitted the buyer's daughter to drive the car, accompanied by the chauffeur, who lost control, the chauffeur, who then took hold of the wheel and steered the car upon the sidewalk, striking a pedestrian, was acting within the scope of his employment, rendering the employer liable for the injuries suffered by the pedestrian.

Same—*Respondeat Superior*—Scope of Employment.

2. Where an employer is sought to be held liable for personal injuries caused by the negligence of his employee under the doctrine of *respondeat superior*, the decisive question is whether at the time of the accident the latter was acting within the scope of his employment; if so, the employer is responsible.

1. Responsibility for negligence of driver of leased or demonstrating car, see notes in *Ann. Cas.* 1916A, 673; 40 *L. R. A. (n. s.)* 457; 44 *L. R. A. (n. s.)* 113; 51 *L. R. A. (n. s.)* 1164.

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Same—Scope of Employment—When Question of Fact—When of Law.

3. Generally speaking, the question whether an employee was acting within the scope of his employment when he caused injury to another is one of fact; where, however, the injury was caused while he was doing something which had no connection with his duties, the question becomes one of law.

Appeals from District Court, Fergus County; Jack Briscoe, Judge.

ACTION by Peter Hoffman against E. R. Roehl and another. From a judgment for plaintiff and an order overruling defendants' motion for a new trial, Roehl appeals. Affirmed.

Messrs. Belden & De Kalb and Messrs. Gunn, Rasch & Hall, for Appellants, submitted a brief and one in reply to that of Respondent; Mr. Carl Rasch argued the cause orally.

There is not a case in the books which would countenance a recovery against the owner of an automobile upon the facts of this case. *Hartley v. Miller*, 165 Mich. 115, 33 L. R. A. (n. s.) 81, 130 N. W. 336, is authority for the proposition that even if Roehl himself, the owner of the car, had been present and had turned the car over to Martha Bean for her use in making the trip to Judith Place, as was done by Leedy, his employee, there would be no liability. We also cite *McFarlane v. Winters*, 47 Utah, 598, L. R. A. 1916D, 618, 155 Pac. 437, approvingly cited by this court in *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575; *Herlihy v. Smith*, 116 Mass. 265; *Wollaston v. Park*, 47 Pa. Sup. Ct. R. 90; *Beville v. Taylor*, 202 Ala. 305, 80 South. 370; *Mangan v. Foley*, 33 Mo. App. 250; *Cooper v. Lowery*, 4 Ga. App. 120, 60 S. E. 1015; *Hills v. Strong*, 132 Ill. App. 174.

But the courts have gone further in the application of the rule of the owner's nonliability, and under like circumstances have absolved him from responsibility for injuries when caused by the negligence of his own servant in the management and operation of a car or other instrumentality intrusted to him. And, under the settled law upon this subject, the defendant, Roehl, could not be held in damages, even if Leedy, instead of Martha Bean, had been operating the car. "The master's

responsibility," said Mr. Justice Moody, speaking for the court in *Standard Oil Co. v. Anderson*, 212 U. S. 215, 53 L. Ed. 480, 29 Sup. Ct. Rep. 252, "cannot be extended beyond the limits of the master's work. If the servant is doing his own work, or that of some other, the master is not answerable for his negligence in the performance of it."

There is, perhaps, no case where the rule is more clearly stated, and no case is more frequently cited in the decisions as a leading authority, than *Wyllie v. Palmer*, 137 N. Y. 248, 19 L. R. A. 285, 33 N. E. 381. See, also, *Clawson v. Pierce-Arrow Motor Car Co.*, 182 App. Div. 172, 170 N. Y. Supp. 310; *Lotz v. Hanlon*, 217 Pa. St. 339, 118 Am. St. Rep. 922, 10 Ann. Cas. 731, 10 L. R. A. (n. s.) 202, 66 Atl. 525; *Goodrich v. Musgrave Fence & Auto Co.*, 154 Iowa, 637, 135 N. W. 58; *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165; *O'Brien v. Stern Bros.*, 223 N. Y. 290, 119 N. E. 550; *Long v. Richmond*, 68 App. Div. 466, 73 N. Y. Supp. 912; *Spradlin v. Wright Motor Car Co.*, 178 Ky. 772, 199 S. W. 1087; *Neff v. Brandeis*, 91 Neb. 11, 39 L. R. A. (n. s.) 933, 135 N. W. 232; *Symington v. Sipes*, 121 Md. 313, 47 L. R. A. (n. s.) 662, 88 Atl. 134; *Wright v. Intermountain Motor Car Co.*, 53 Utah, 176, 177 Pac. 237; *Brown v. Jarvis Engineering Co.*, 166 Mass. 75, 55 Am. St. Rep. 382, 32 L. R. A. 605, 43 N. E. 1118; *Walker v. Hannabal & St. Joe R. R. Co.*, 121 Mo. 575, 42 Am. St. Rep. 547, 24 L. R. A. 363, 26 S. W. 360.

The plaintiff not only failed to make a case against the defendant, Roehl, but there was a like failure of showing negligence on the part of Leedy in connection with the operation of the car. The accident was due to an emergency which could not have been foreseen and which made it impossible to avoid it. (20 R. C. L., p. 29; *Hughes v. Oregon Improvement Co.*, 20 Wash. 294, 55 Pac. 119.) This principle was applied by this court in *Bracey v. Northwestern Improvement Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706. (See, also, *Eckert v. Long Island R. Co.*, 43 N. Y. 502, 3 Am. Rep. 721; *Floyd v. Philadelphia & Reading R. Co.*, 162 Pa. St. 29, 29 Atl. 396;

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Ackerman v. Union Traction Co., 205 Pa. St. 477, 55 Atl. 16; *Bishop v. Belle City Street Ry. Co.*, 92 Wis. 139, 65 N. W. 733; *Kulch v. National Contract Co.*, 178 Ky. 632, 199 S. W. 796; *Pond v. Norfolk & W. Ry. Co.*, 111 Va. 735, 69 S. E. 949; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.)

Mr. E. K. Cheadle and *Messrs. Wheeler & Baldwin*, for Respondent, submitted a brief; *Mr. Cheadle* and *Mr. James H. Baldwin* argued the cause orally.

It appears from the evidence in this case that at the time plaintiff was injured the car was owned by the defendant Roehl; this alone was sufficient evidence to take the case to the jury and to justify the ruling of the court in denying the motion for a directed verdict. Ownership of the car being established, that makes out a *prima facie* case that the operator of the car was engaged in the owner's service, and the burden is upon the owner to show that such is not the fact. (*Hartnett v. Hudson*, 165 N. Y. Supp. 1034, 1036; *Ferris v. Sterling*, 214 N. Y. 249, Ann. Cas. 1916D, 1161, 108 N. E. 406; *George v. Carstens Co.*, 91 Wash. 637, 158 Pac. 529; *Benn v. Forrest*, 213 Fed. 763, 130 C. C. A. 277.)

At the time of the injury the defendant Roehl was the owner of the car and the same was actually proceeding under the control of his agent, and under this condition the law presumes that the car was being driven for the owner Roehl and that in driving the same the defendant Leedy was acting within the scope of his employment. (*Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125; *Birch v. Abercrombie*, 74 Wash. 486, 50 L. R. A. (n. s.) 59, 133 Pac. 1020.)

The terms "course of employment" and "scope of authority" are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule, the authority from the master generally being gatherable from the surrounding circumstances. (26 Cyc. 1533, 1534.)

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An act is within the scope of the servant's employment, where necessary for the accomplishment of the purpose of his employment and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. (26 Cyc. 1534; sec. 5450, Rev. Codes; see, also, *Mansfield v. Burns Detective Agency*, 102 Kan. 687, L. R. A. 1918D, 571, 171 Pac. 625; *Sina v. Carlson*, 120 Minn. 283, 139 N. W. 601; *Ellinghouse v. Ajax Livestock Co.*, 51 Mont. 275, L. R. A. 1916D, 836, 152 Pac. 481.)

Even if it be conceded that Martha Bean was actually directing the movements of the car at the time of the injury to plaintiff and that the defendant Leedy was not authorized by the defendant Roehl to allow her to operate the car as she did, the defendant Roehl would still be liable for the injury suffered by the plaintiff in this action. The owner is liable for the chauffeur if, while using the car on his employers' business, he allows a third person riding with him to assume the management of the car and an injury results from the negligent driving of such person. (*Slothower v. Clark*, 191 Mo. App. 105, 179 S. W. 55, and cases cited; *Prince v. Taylor* (Tex. Civ. App.), 171 S. W. 826; *Wooding v. Thom*, 148 App. Div. 21, 132 N. Y. Supp. 50, 53; *Hollidge v. Duncan*, 199 Mass. 121, 17 L. R. A. (n. s.) 982, 85 N. E. 186; *Thyssen v. Davenport Ice etc. Co.*, 134 Iowa, 749, 13 L. R. A. (n. s.) 572, 112 N. W. 177; *Campbell v. Trimble*, 75 Tex. 270, 12 S. W. 863; *Bamberg v. International Ry. Co.*, 53 Misc. Rep. 403, 103 N. Y. Supp. 297; *Kilroy v. Delaware & H. C. Co.*, 121 N. Y. 22, 24 N. E. 192; *Bank of California v. Western Union Tel. Co.*, 52 Cal. 280, 290.)

This case does not fall within the rule announced by this court in the case of *Bracey v. Northwestern Improvement Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706, cited by appellants. Viewing the facts in this case in the light of the reason for the rule last announced in the above case, and it follows that even though it were admitted that the defendant Leedy inflicted the injury upon the plaintiff

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in this case while attempting to avoid injury to himself or others, the liability would exist, for the reason that the defendant Leedy, acting within the scope of his employment as the agent of the defendant Roehl, carelessly brought about and contributed to the situation of peril in which appellants contend he found himself. The rule is that where one, by his own act or negligence, puts another in peril, and to escape the consequence of his act of negligence does something that injures another, he is liable for the injury. (*Carpenter v. Campbell Automobile Co.*, 159 Iowa, 52, 140 N. W. 225; *Prince v. Taylor* (Tex. Civ. App.), 171 S. W. 826, 829.)

MR. JUSTICE GALEN delivered the opinion of the court.

This is an action for damages on account of personal injuries sustained by the plaintiff by reason of having been run into by a Ford automobile belonging to the defendant E. R. Roehl, driven at the time on Main street, in the city of Lewistown, by one Martha Bean, the daughter of Daniel Bean; the latter at the time having been negotiating with Roehl for the purchase of the car. E. R. Roehl and Joseph Leedy, employee, were jointly made defendants. It appears that Daniel Bean wanted to buy a Ford automobile and approached the defendant Roehl, an automobile dealer in Lewistown, and inquired whether he had any bargains in Ford cars. Roehl replied that he had one which he would sell for \$250, but that the engine had to be overhauled and the motor cleaned. Bean told Roehl to have the work done, "prove that the car would run uphill," and he would buy it. Three or four days subsequently, on November 21, 1916, Bean visited Roehl's place of business and Roehl then and there said to Bean that the car was cleaned and in readiness to make a "go out." Bean asked Roehl who he would send out with the car, to which he replied: "Joe Leedy." At the time Roehl was in his office, and Bean went therefrom into the workroom adjoining, and upon inquiry found Joe Leedy. Leedy cranked the car and both Leedy and Bean got into the car and went away. At Bean's suggestion, Leedy drove the

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car to Bean's residence, several blocks distant from the starting point, in order that Bean might show it to his wife and daughter. After arriving at Bean's house, his wife and daughter came out and looked at the car. His daughter Martha was accompanied by a friend, Miss Christopher, and both had their hats and wraps on, as Martha was intending to go across town to Judith Place, in order to make delivery of a dress to a lady for whom she had made the same. Bean invited the girls to get into the car and requested Leedy to let Martha drive, saying: "She will be my chauffeur if I get it, so let her be the first to run it." Martha got in, took the wheel, and Leedy sat in the front seat alongside of her; Mr. Bean and Miss Christopher getting into the rear seat. The car was then driven by Martha across town to Mrs. Taft's residence, where she stopped the car and made delivery of the dress. She then started the car again and proceeded up Main Street to the intersection of Fourth Avenue, where traffic was greatly congested. At or near that point a speeding motorcycle caused two men to jump out of its way and into the path of the car driven by Miss Bean, in consequence whereof she lost control of the car and Leedy grabbed hold of the wheel, and the car was steered upon the sidewalk, striking and seriously injuring the plaintiff. Leedy testified: "I have resided in Lewistown, Montana, since January, 1914, continuously. On the twenty-first day of November, 1916, I had been engaged in the automobile business as an employee of E. R. Roehl since January, 1914. I saw Daniel Bean for the first time on November 21, 1916. On said date I took a certain Ford automobile from the garage of E. R. Roehl, at Lewistown, Montana, for the purpose of exhibiting or demonstrating the car to the said Daniel Bean, at the direction of Mr. Roehl. I first met Martha Bean on that day." At that time the plaintiff was employed by the Chicago, Milwaukee & St. Paul Railroad, as an engineer, and was earning from \$150 to \$175 per month. He was in good physical condition, thirty-five years of age, and married.

Issue being joined, the cause was tried to a jury and resulted in a verdict and judgment against the defendant Roehl in favor of the plaintiff for the sum of \$16,800. At the close of plaintiff's case, the defendant Roehl moved for a directed verdict, which motion was denied, and the case went to the jury without any evidence being offered in defense. Appeal is prosecuted by the defendant Roehl from the judgment and order overruling defendant's motion for a new trial.

Several errors are assigned, involving but one principal question, solution of which is determinative of the case, viz.: The liability of the defendant Roehl for damages on account of plaintiff's injuries, in application of the doctrine of *respondet superior*.

The rules applicable have been crystallized into statute in this state. Section 5442, Revised Codes, provides: "An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." And section 5450 reads as follows: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

These statutory provisions are merely declarative of the common law, and in their application to the facts in the case before us the liability of the employer is clear. The employee Leedy was directed by his employer to take the automobile from the garage "for the purpose of exhibiting or demonstrating the car" to Daniel Bean, a prospective purchaser; and in such position, and acting under such direction of his employer, the object and purpose of the employee was necessarily to bring about accomplishment of the sale in contemplation. In acceding

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to the wishes of Martha Bean to go across town to Judith Place to make delivery of the dress, and to the request of her father that she be permitted to drive the car, we think Leedy acted within the scope of his employment. The agent took his place in the front seat of the automobile, alongside of Martha Bean, showed her how to control the car, how to start it, what pedals to use, and the like. Miss Bean testified: "Mr. Leedy said that I was doing very good, and I told him that I had never driven a car in town before and that I wouldn't drive it if he hadn't been with me. I told him to pay particular attention to me and see that nothing happened, to be ready to help me if anything should happen, because I didn't feel exactly safe on Main Street. That was the first time I had ever attempted to drive a car in the business section of any town."

As applicable to this case, we quote with approval the language used by Mr. Justice Young, speaking for the Supreme Court of New Hampshire, in *Danforth v. Fisher*, 75 N. H. 111, 71 Atl. 535, as follows: "The test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way expected is immaterial [citing cases]. But, if at the time he did the act which caused the injury he was not acting within the scope of his employment, the master is not liable." And this view is entirely consistent with the provisions of our statute and in accord with the views expressed by this court in *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575.

The decisive question in every instance is whether the agent [2] or employee was, at the time of negligent injury, acting within the scope of his employment. If he acted independently of his employer, or was upon missions or purposes of his own, [3] then the employer is not to be held accountable in damages. Necessarily, in most instances, the question is one of fact. It becomes one of law, however, whenever it appears that the given deviation was made for the purpose of doing

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something which had no connection with the servant's duty. "In determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was, at the time, engaged in serving his master. If the act is done while the servant is at liberty from service and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master." (1 Shearman & Redfield on the Law of Negligence, 6th ed., sec. 147.)

The employer or principal is liable for the negligent acts of his employee while acting as his representative, and the purpose of the act rather than its method of performance is the test of the scope of his employment. (26 Cyc. 1534.)

Defendant has cited many cases in support of his contention of nonliability, but they are all distinguishable from the case under consideration. In those cases the missions of the servant were outside the scope of his employment and pertained primarily to the employee's personal pleasure, business or affairs, or were instances where the employee had surrendered control of the automobile to a third person for a purpose independent of and not connected with the business of the employer.

We concede the law as contended for by the defendant, that where the servant steps aside from his master's business, if but for a short space of time, and does an act not connected with the business, which is harmful to another, the master is not liable, the reason being that the relation of master and servant does not at the time exist; but here the servant continued about the business of his employer, adopting methods deemed expedient, resulting in a third person's injury, and the employer is liable. (18 R. C. L., p. 796.)

In this case the proof neither shows an independent mission by the employee for purposes of his own outside the scope of his employment nor the surrender of control of the operation of the car to a stranger. In making exhibition and demonstra-

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tion of the car to the prospective purchaser, Leedy permitted Miss Bean to operate the car; and at the time of the accident he was by her side on his master's business, grabbed the wheel, and the accident complained of resulted. There was no break in the continuity and purpose of the mission, and the hand of the servant was physically on the steering wheel of the car at the time of the accident. It is plain that the accident occurred through the negligence of the agent in the transaction of the business of the agency, and in consequence the principal is liable.

By legal intendment the act of the employee became the act of the employer; the individuality of the employee being identified with his employer. The latter is deemed to have been constructively present, and the act of the employee that of the employer, and thus the latter becomes accountable for his own proper act or omission. (18 R. C. L., p. 786.)

"He who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it," said Lord Chief Justice Best in *Hall v. Smith*, 2 Bing. 156.

We are not unmindful that the application of the rule may, and often does, work hardships, and that in the case before us a hardship is undoubtedly worked upon the employer; however, the rule is founded on reason and looks to the protection of third persons. The verdict might be considered excessive in view of the evidence, but, as no contention is made in this respect, the subject is passed without further notice.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

Rehearing denied January 6, 1922.

NELSON, RESPONDENT, v. GOUGH ET AL., APPELLANTS.

(No. 4,497.)

(Submitted September 26, 1921. Decided November 14, 1921.)

[202 Pac. 196.]

Water Rights—Retrial—Complaint—Amendment—Identity of Issues—Deceased Witness—Evidence on Former Trial—Admissibility—Lost Documents.

Water Rights—Complaint—Amendment Before Retrial—Identity of Issues—Deceased Witness—Evidence on Former Trial—Admissibility.

1. Where a retrial of a water right suit was had upon a complaint which had been amended after the first trial, without, however, changing the issues, the only difference between the two pleadings being that in the amended one an allegation appeared, not found in the original pleading, that an agreement had been entered into by the predecessors of the parties fixing the amount of water each should be entitled to use, evidence relating to the agreement, given by one of them at the first trial, who had died in the interim, was admissible, the record showing that the witness had been thoroughly cross-examined touching its execution, terms and conditions.

Private Writings—When Deemed Lost.

2. A showing that the owner of a private writing removed to a foreign country sufficiently accounts for its nonproduction to warrant admission of oral testimony to prove its contents, the presumption being that he took it with him.

Lost Private Writings—Contents—Evidence—Sufficiency.

3. Under the rule that proof of the contents of a lost writing is sufficient if the witness who has read it can state them substantially and with reasonable accuracy, testimony giving approximately the date of a written agreement adjusting water rights between two claimants, the circumstances under which it was made and the subject matter and disposition made of their respective contentions was not objectionable as not fully stating its terms.

Appeals from District Court, Missoula County; R. Lee McCulloch, Judge.

1. When testimony of witness at former trial admissible in civil cases, see notes in 91 Am. St. Rep. 193; 21 Ann. Cas. 179; 14 L. R. A. (n. s.) 488; L. R. A. 1915F, 771.

3. Sufficiency of proof to establish contents of lost instrument, see notes in 134 Am. St. Rep. 1095; 2 Ann. Cas. 41; Ann. Cas. 1917A, 1104; L. R. A. 1918B, 879.

Admissibility of parol evidence to show contents of lost memorandum required by statute of frauds to be in writing, see note in Ann. Cas. 1916E, 173.

[61 Mont. 301.]

ACTION by Frank Nelson against William R. Gough and another. Judgment for plaintiff, and from it and an order denying a new trial, defendants appeal. Affirmed.

Cause submitted on briefs of Counsel.

Mr. Albert Besancon, for Appellant.

Messrs. Patterson & Heyfron, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was instituted to have determined the relative rights of the parties to the use of the waters of Nelson Creek—sometimes called Brock Creek—in Missoula county. The cause was tried first in 1915 and retried in 1918, resulting in a judgment in favor of the plaintiff, from which judgment and an order denying a new trial defendants appealed.

The second trial was had upon an amended complaint filed after the first trial, the answer thereto, and a cross-complaint by the defendants, and the plaintiff's reply. In the amended complaint it is set forth, among other things, that in 1885 the plaintiff through his immediate predecessor, George W. Lish, appropriated two-thirds of the waters of Nelson Creek; that the predecessor of defendants, one August Gustine, about the same time made an appropriation of water from the same creek; that a controversy arose between these original appropriators respecting their rights, and, for the purpose of adjusting their differences, they entered into an agreement by the terms of which Gustine acknowledged the right of Lish to the use of two-thirds of the waters of Nelson Creek, and Lish acknowledged the right of Gustine to the use of one-third, each of the rights to be regarded as of even date; that thereafter and until about the time this action was commenced the agreement was recognized and carried into effect by the original appropriators and their respective successors in interest.

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The answer is substantially a general denial of the allegations of the amended complaint. By way of cross-complaint the defendants claim a prior appropriation by Gustine of one-half of the waters of Nelson Creek and an exclusive appropriation of the waters of certain springs. All the allegations of the cross-complaint were put in issue by the reply.

George W. Lish, a principal witness for the plaintiff at the [1] first trial, died before the second trial, and his testimony given at the first trial was introduced at the second trial over the objections of the defendants. The amended complaint did not effect any change of parties, and confessedly the evidence produced by the witness was relevant and material; but it is contended that the issues were changed by the amendment, and for this reason the evidence should have been excluded. If the premise be granted, the conclusion might follow; but the only foundation for the premise is laid in the fact that the original complaint did not make reference to the settlement agreement which is pleaded in the amended complaint.

The reason for the rule which requires substantial identity of issues is apparent at once. If the issues presented on the former occasion were materially different, the cross-examination of the witness "would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods." (2 Wigmore on Evidence, sec. 1386.) "Conversely it is sufficient if the issue was the same or substantially so with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law." (*Id.*, sec. 1387.)

The matter in dispute throughout this controversy—the issue to be determined—was the relative rights of the parties to the use of the waters of Nelson Creek. The amended complaint did not change the issue or introduce any new or different element. It did violate an elementary rule of pleading in that it incorporated a material portion of plaintiff's evidence. If we assume the existence of the agreement between Lish and

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Gustine, it amounted to a declaration by each of them relating to his property while he was holding title. With the necessary preliminary proof made, the agreement was admissible under the original complaint. (Sec. 7866, Rev. Codes; *Phillips v. Coburn*, 28 Mont. 45, 72 Pac. 291.) Furthermore, it appears from the record that the witness was cross-examined at great length respecting every circumstance touching the origin and execution of the agreement as well as its terms and conditions.

The agreement was made in 1885 and reduced to writing in [2] duplicate, one copy delivered to Lish and the other to Gustine. It appears that Lish lost his copy within four or five years thereafter, and that Gustine sold out his property interests in 1891, and, as stated in appellants' brief, "returned to Sweden. He could not be located there and was not available as a witness."

Section 7872, Revised Codes, provides, among other things: "There can be no evidence of the contents of a writing other than the writing itself except in the following cases: Where the original has been lost or destroyed, in which case the proof of the loss or destruction must first be made," and oral evidence may thereafter be given. It is insisted that there is not any proof of the loss or destruction of the original writing delivered to Gustine, and therefore secondary evidence was not admissible. The instrument was a private writing, the personal property of Gustine, and, in the absence of any showing to the contrary, we think it is a fair presumption that he took his copy with him when he returned to Sweden, and this sufficiently accounts for its nonproduction.

Section 1855, Code of Civil Procedure of California, adopted in 1872, is identical in its provisions with section 7872, above, first adopted in Montana in 1895. In *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786, decided in 1893, the section of the California Code was construed. The court concluded: "A letter that is beyond the territory of the state is, within the meaning of the statute, 'lost,' so as to allow secondary proof of its contents." In support of its position the court cited *Gordon*

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v. *Searing*, 8 Cal. 49, *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299 [see, also, *Rose's U. S. Notes*], and *Manning v. Maroney*, 87 Ala. 563, 13 Am. St. Rep. 67, 6 South. 343. We think it is apparent that it was the intention to incorporate in the statute a rule of evidence which had been in force generally for many years before the statute was adopted, and, while there has been some diversity of judicial opinion as to the proper application of the rule, the view expressed by the California court meets with our approval.

Again, it is insisted that the evidence relating to the [3] contract should have been excluded because the witness did not state fully the terms of the agreement. Omitting the preliminaries, the witness testified: "Why, it was something of an agreement that each one should have water; that I should have two-thirds of the water and that he should have one-third of the water, and we were to live up to the agreement, respectively; that we were to put a box in the ditch and take our share of the water and divide it that way. I got one of these and took it home and had it there for two or three years. Judge Stephens signed it as a witness. Well, that was the contents of the contract, that was in dividing the water, and nothing else, and that was what we came to settle, and we settled it in that way. There was nothing else said." We think this meets the requirements of the law. It is true that in *Capell v. Fagan*, 30 Mont. 507, 2 Ann. Cas. 37, 77 Pac. 55, this court used the following language: "Proof of such contents requires a practical reproduction of the instrument in all of its substantial parts;" but, when the language is read in the light of the facts of that particular case, no different rule is announced from that approved by the authorities generally, viz., the substance of the agreement must be proved by a fair preponderance of the evidence. It is enough if an intelligent witness has read the document and can state substantially its contents and import with reasonable accuracy. The witness cannot be expected to repeat the language of the instrument *verbatim*, and in this instance, in view of the fact

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that the witness Lish was more than eighty years old when he gave his testimony and was testifying concerning a transaction had thirty years previously, if he had essayed to repeat the very terms of the agreement, that fact alone would have been so suspicious as to reflect seriously upon his integrity. All that he could be expected to remember was that he and Gustine entered into the agreement, giving approximately the date and stating the circumstances, the subject matter, and disposition made of their respective contentions. To require more would defeat the very purpose of the rule. (2 Jones' Commentaries on Evidence, sec. 227.)

The record discloses that the measuring-box was placed in the stream and so constructed with a partition that one-third of the water was diverted into Gustine's ditch, and two-thirds permitted to flow down to the Lish ditch; that this box was so constructed and placed by direction of Gustine; that Gustine and his successors observed that rule of division for about twenty-five years and until the present defendants succeeded to the Gustine interest.

The other assignments do not require special consideration. There is some conflict in the testimony, but it cannot be said that the evidence preponderates against the trial court's findings.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, REYNOLDS and GALEN concur.

BENNETT, RESPONDENT, v. MEEKER, APPELLANT.

(No. 4,479.)

(Submitted September 23, 1921. Decided November 14, 1921.)

[202 Pac. 203.]

Claim and Delivery—Statute of Limitations—Livestock—Estrays.

Claim and Delivery—Livestock—Estrays—Statute of Limitations.

1. Section 6449, subdivision 4, providing that an action for fraud or mistake must be brought within two years after discovery of the facts, applies only to actions for fraud or mistake within the common acceptation of those terms, and not to an action in claim and delivery where defendant honestly and in good faith bought an estray from one wrongfully claiming to be the owner of the animal.

Statutory Construction.

2. In construing a statute, the court must, if possible, ascertain the intent of the legislature in enacting it, and so construe it as to give effect to such intention.

Livestock—Estrays—Duty of Finder.

3. One finding an estray is under no obligation to advertise the find in a county adjoining that in which the finder resides, or correspond with the recorder of brands in an effort to ascertain the rightful owner.

Claim and Delivery—Estrays—Ignorance of Owner—Right of Action—Statute of Limitations.

4. In an action in claim and delivery to recover possession of a cow picked up by defendant and later in good faith purchased from one claiming to be but who was not the owner, defendant not having done anything to prevent the true owner from ascertaining the whereabouts of the animal and learning of his right of action, the fact that plaintiff was ignorant of the circumstances which would have enabled him to bring timely suit did not entitle him to sue after the limitation of two years fixed by subdivision 3 of section 6449, Revised Codes, had run.

Appeals from District Court, Gallatin County; Ben B. Law, Judge.

ACTION by George Bennett against Vina Meeker. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

4. When limitations commence to run against action to recover lost property, see note in 29 L. R. A. (n. s.) 120.

[61 Mont. 307.]

Messrs. Gibson & Smith, for Appellant, submitted a brief; *Mr. Fred L. Gibson* argued the cause orally.

Citing: *Harpending v. Meyer*, 55 Cal. 555; *Hawrd v. Lung*, 19 Idaho, 790, 115 Pac. 930; *Yore v. Murphy*, 18 Mont. 342, 45 Pac. 217; *Dee v. Hyland*, 3 Utah, 308, 3 Pac. 388; *Leavitt v. Shook*, 47 Or. 239, 83 Pac. 391.

Messrs. Keistr & Bath, for Respondent, submitted a brief; *Mr. Herbert D. Bath* argued the cause orally.

The statute of limitations does not begin to run against a party where through no fault of his own he does not obtain knowledge of the facts which constitute his cause of action, and the statute does not begin to run until he had a reasonable opportunity of ascertaining these facts. In support of this proposition we offer the following authorities: *Spreckels v. Spreckels*, 172 Cal. 775, 158 Pac. 537; *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58, 122 C. C. A. 372; *Lasher v. McCreery*, 66 Fed. 834; *Platt v. Platt*, 58 N. Y. 646.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

This is an action in claim and delivery to recover the possession of a cow and increase two calves. The cause was first tried to a justice of the peace and judgment rendered for plaintiff. Upon appeal a trial was had in the district court, a jury being waived by both parties. Judgment was duly given and entered for the plaintiff. From the judgment and the order denying a motion for a new trial defendant appeals.

There is no conflict in the evidence. It appears that in the [1] fall of 1914, the cow strayed from plaintiff, and came, along with defendant's cattle, to her ranch, and that she made diligent inquiry of the range riders, and also advertised in the "Shields Valley Record," a weekly, published at Wilsall, Park county, Montana, and generally circulated in the neighborhood of her ranch, to ascertain the owner. In the advertisements,

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the brand was first described as EK, and later, after the cow had been sheared it looked like 5K, and was described accordingly in the advertisement. Both parties herein live in Galatin county, Montana.

In December, 1914, or January, 1915, one Edgar Gibson, a resident of Clyde Park, Park county, Montana, claimed the cow as his property, and sold it to defendant for the sum of \$25. Defendant has ever since the animal came to her ranch retained open possession of the cow and her increase. In the summer of 1917, plaintiff, after having continuously searched for it and made inquiries among his neighbors, appeared at defendant's ranch and demanded the cow. It bore his recorded brand, 5K. There is no question raised as to the identity or ownership of the animal, but defendant contends that the action for its possession is barred by the statute of limitations (subd. 3 of section 6449, Rev. Codes, as amended by Chap. 47, Laws 1917). The pertinent portion of the amended section reads as follows:

“Section 6449. Within two years:

“1. An action upon a liability created by statute other than a penalty of forfeiture.

“2. An action for waste or trespass on real or personal property; provided that, when the waste or trespass is committed by reason of underground work upon any mining claim, the cause of action shall not be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting such waste or trespass.

“3. An action for taking, detaining or injuring any goods or chattels including actions for the specific recovery of personal property.

“4. An action for relief on the ground of fraud or mistake the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

“5. An action for killing or injuring stock by a railroad corporation or company.”

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This is not an action for relief on the grounds of fraud or mistake under the fourth subdivision, as this applies only to actions for fraud or mistake within the common acceptance of the term. (*Havird v. Lung*, 19 Idaho, 790, 115 Pac. 930, and cases cited.)

The law is well settled that in construing a statute, we must [2] ascertain if possible the intent of the legislature in enacting it, and so construe it as to give effect to that intention.

It will be observed that under subdivisions 2 and 4 the cause [3,4] of action does not accrue until a discovery is made by the party aggrieved. No mention of any such discovery appears in subdivision 3, under which this action is brought, and we cannot read into it that which the legislature, with apparent design, omitted. When, then, did this plaintiff have the right to sue for his property? Plaintiff's position is that the statute does not apply because he was diligent in search for his animal and on account of defendant's failure to advertise in Gallatin county, and likewise to correspond with the recorder of brands, and that therefore defendant was guilty of fraud. There is no duty imposed on defendant to seek the owner through such channels. She showed her honesty and good faith in advertising in the paper generally circulated in the vicinity of her home, where as a reasonable being she undoubtedly believed the owner resided. In support of his contention plaintiff cites *Spreckels v. Spreckels*, 172 Cal. 775, 158 Pac. 537; *American Tobacco Co. v. People's Tobacco Co.*, 204 Fed. 58, 122 C. C. A. 372; *Lasher v. McCreery* (C. C.), 66 Fed. 834; *Platt v. Platt*, 58 N. Y. 646; *Runyon v. Snell*, 116 Ind. 164, 8 Am. St. Rep. 839, 18 N. E. 522; *Quimby v. Blackey*, 63 N. H. 77.

We have carefully analyzed all of these decisions and others as well along the same line, but can find no parallel in them to the instant case. They are based upon fraud and concealment or in contravention of a right which came into being long after the cause of action was alleged to have accrued.

We find that the well-settled law on the identical situation in this case holds with the defendant, however harsh its application may seem.

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This animal was bought honestly and in good faith by the defendant, yet its possession and use was a wrong upon and in violation of the rights of plaintiff from the time defendant bought it, for which he had his remedy at law for an unlawful conversion at any time within two years from date of conversion. It may be argued that such a right is in reality no right, but ignorance of the facts necessary to give plaintiff a right of action cannot be implied by law unless it is occasioned by improper conduct of the defendant, and no such conduct appears in this record. Therefore reversal is imperative. (*Dee v. Hyland*, 3 Utah, 308, 3 Pac. 388; *Leavitt v. Shook*, 47 Or. 239, 83 Pac. 391; *Yore v. Murphy*, 18 Mont. 342, 45 Pac. 217, and cases therein cited.) Any implication to the contrary which may be contained in *Woods v. Latta*, 35 Mont. 9, 88 Pac. 402, is hereby expressly disapproved.

The application of this subdivision of the law may appear rigid and unfair, and it finds its way into the statutes doubtless upon the theory that under the law of averages it gives the greatest good to the greatest number in tolling the rights of negligent claimants. The remedy for curing its apparent defects with respect to diligent and honest owners rests with the legislature and not with this court.

For the reasons herein stated, we recommend that the judgment and order denying a new trial be reversed, and the cause remanded to the district court, with directions to enter judgment for the defendant.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed, and the cause is remanded to the district court, with directions to enter judgment for the defendant.

Reversed and remanded.

HINDERAGER, RESPONDENT, v. MACGINNISS, APPELLANT.

(No. 4,484.)

(Submitted September 24, 1921. Decided November 21, 1921.)

[202 Pac. 200.]

*Default Judgments—Setting Aside—Inexcusable Delay—Judgments in Personam—Constructive Service of Summons—Jurisdiction—Appearance—Waiver.**Judgment in Personam—Summons—Constructive Service Insufficient.*

1. A judgment in *personam* cannot be rendered upon constructive service of summons alone.

Same.

2. Where an attachment is issued in an action not falling within the provision of section 6656, Revised Codes, and service of summons is made by publication only, the property of defendant is not brought within the jurisdiction and control of the court, and a judgment by default, being one in *personam*, is void.

Practice—Challenging Jurisdiction—Special Appearance.

3. One desiring to challenge the jurisdiction of the court over his person on the ground that he had not been served with valid summons, must make a special appearance for that purpose.

Default Judgment—Objection to Jurisdiction—General Appearance—Waiver.

4. Where defendant in an action in which an attachment had been issued moved to vacate a default judgment on the ground of want of jurisdiction because of invalid service of summons, and on the further ground of excusable neglect, at the same time asking for leave to file his answer, his appearance was general, resulting in a waiver of his objection to jurisdiction.

Same—Setting Aside—Inexcusable Delay.

5. Where defendant knew of the pendency of an action against him five months before judgment by default was entered but took no steps looking to a defense on the merits until seven months after its entry, when he moved to set it aside, asking leave to file his answer, and thereafter for three years more neglected to bring his motion on for hearing, denial of the motion on the ground of inexcusable delay was proper.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by E. K. Hinderager against John MacGinniss. From an order denying motion to set aside a default judgment, defendant appeals. Affirmed.

4. General appearance after judgment as waiving want of jurisdiction over person, see note in *Ann. Cas.* 1914C, 694.

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Messrs. Davis, Haskins & Davis and *Messrs. Pray & Callaway*, for Appellant, submitted a brief, and one in reply to that of Respondent; *Mr. Lew L. Callaway* argued the cause orally.

Statutory provisions for obtaining service on absent or non-resident defendants constructively are in derogation of the common law and must be strictly construed; and a judgment obtained by such service is not entitled to the presumption of regularity in its favor which attaches to the proceedings and judgments of courts of general jurisdiction, when the defendants are actually before them. (*Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585; 13 Mont. 185, 40 Am. St. Rep. 434, 33 Pac. 132; *English v. Jenks*, 54 Mont. 295, 169 Pac. 727.) The recital in the judgment that service had been perfected cannot cure a defect which the record shows. (*Burke v. Inter-State Savings Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879.) Service by publication cannot be had in an action strictly *in personam*. (*Silver Camp Mining Co. v. Dickert*, 31 Mont. 488, 3 Ann. Cas. 1000, 67 L. R. A. 940, 78 Pac. 967; *Thrift v. Thrift*, 54 Mont. 463, 171 Pac. 272.)

Constructive service is effectual only in actions strictly *in rem*, in actions affecting the personal status of the plaintiff, and in actions to recover upon money demands where and to the extent that some lien brings property into court as a *res* to answer for the judgment that may be entered. (*English v. Jenks*, 54 Mont. 295, 169 Pac. 727.)

Due process of law in this state requires that the summons for publication contain a general statement of the nature of the action; the "general statement," brief though it may be, must state such nature in terms sufficient to inform the defendant whether or not the nature of the action is *in rem* or *in personam*, and if not strictly *in rem*, whether or not it is such as affects the personal status of the plaintiff or will permit plaintiff to bring property of defendant into the court to support a judgment. (*Netzorg v. Geren*, 26 Tex. Civ. App. 119, 62 S. W. 789; *People v. Greene*, 52 Cal. 577; *Smith v.*

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Aurich, 6 Colo. 388; *Atchison, T. & S. F. R. Co. v. Nicholls*, 8 Colo. 188, 6 Pac. 512.)

The defendant has never made any voluntary general appearance equivalent to service upon him. Jurisdictional defects may only be waived by a "voluntary appearance" in the words of section 6526, Revised Codes. "The jurisdictional objection is not waived even by at the same time asking leave to file an answer, thus indicating a willingness to submit to the jurisdiction of the court, as this does not validate the void judgment, although the court may thereafter entertain an action pending in which the defendant has voluntarily appeared." (*Godfrey v. Valentine*, 39 Minn. 336, 12 Am. St. Rep. 657, 40 N. W. 163; *Simensen v. Simensen*, 13 N. D. 305, 100 N. W. 708; *Driscoll v. Tillman*, 165 Wis. 245, 161 N. W. 795; *Chicago, M. & St. P. Ry. Co. v. McClelland*, 39 S. D. 191, 163 N. W. 675.)

The judgment being void on its face, a mere nullity, and serving no other purpose than to encumber the court's records, may be, therefore, vacated at any time, and an affidavit of merits in such case need not accompany the motion. (*State ex rel. Smith v. District Court*, 55 Mont. 602, 179 Pac. 831.) An affidavit of merits and prejudice would obviously be merely surplusage on such a motion; its consideration should find no place where one demands his legal rights to be relieved from a judgment obtained by plaintiff who has not pursued the course prescribed by law. (*Roberts v. Pawley*, 50 S. C. 491, 27 S. E. 913; *Wendel v. Durbin*, 26 Wis. 390; *Heffner v. Gunz*, 29 Minn. 108, 12 N. W. 342; *Mackubin v. Smith*, 5 Minn. 367; *Savings Bank v. Authier*, 52 Minn. 98, 18 L. R. A. 498, 53 N. W. 812; *Skjelbred v. Shafer*, 15 N. D. 539, 125 Am. St. Rep. 614, 108 N. W. 487; *Rice v. Gniffith*, 9 Iowa, 539; *Hanson v. Wolcott*, 19 Kan. 207.)

The judgment being void on its face, it was not necessary to resort to a court of equity with its incident expense and delays in the formation and trial of the issues. The defendant had the right of procuring the vacation of the judgment by

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motion made to the court in which it was rendered. (1 Black on Judgments, sec. 303.)

“Where the default or judgment taken thereon is irregular, the appropriate remedy is a motion to vacate and set aside.” (6 Ency. Pl. & Pr. 151.)

The fact that an execution was issued and returned involuntarily satisfied does not limit this right. Quoting from 3 C. J. (Appeal and Error), section 549, an analogous subject: “The involuntary payment, performance or satisfaction of a judgment, order or decree, does not affect the right of appeal.” (*O’Hara v. MacConnell*, 93 U. S. 150, 23 L. Ed. 840 [see, also, *Rose’s U. S. Notes*].)

Messrs. McKenzie & McKenzie, for Respondent, submitted a brief; *Mr. John McKenzie* argued the cause orally.

The *alias* summons was a sufficient compliance with section 6522, Revised Codes. (See *Commissioners of Jefferson County v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *Gage v. Maryatt*, 9 Mont. 265, 23 Pac. 337; *Calderwood v. Brooks*, 28 Cal. 153.) “A very general statement of the nature of the action is sufficient.” (*People v. Dodge*, 104 Cal. 487, 38 Pac. 203. See, also, *King v. Blood*, 41 Cal. 314; *Clark v. Palmer*, 90 Cal. 504, 27 Pac. 375; *Decorvet v. Dolan*, 7 Wash. 365, 35 Pac. 72.) “For failure to pay a certain claim due for commission on sale of farm is sufficient.” (*Bucklin v. Strickler*, 2 Neb. 602, 49 N. W. 371.) “For \$100 damages in an action upon a contract” satisfied the statute. (*Bray v. Andreas*, 1 E. D. Smith (N. Y.), 387.) “For money due” discloses sufficiently the nature of the action. (*Silkman v. Boiger*, 4 E. D. Smith (N. Y.), 236.) “It was not designed that the summons should supply the place of a complaint in stating the nature of the action. A general statement avoiding details is sufficient.” (*Houston etc. Ry. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808. See, also, 1 Black on Judgments, sec. 83; *Ballew v. Young*, 24 Okl. 182, 23 L. R. A. (n. s.) 1084, 103 Pac. 623; *Garrett v. Struble*, 57 Kan. 508, 46 Pac. 493.)

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Respondent contends that by making his motion to have the judgment vacated and for leave to answer, appellant made a general appearance in the case and thereby waived all defects in process, service of process, and in all other proceedings preliminary to judgment and cannot now object to the court's jurisdiction. (*Gray v. Gates*, 37 Wis. 614; *State ex rel. Mackey v. District Court*, 40 Mont. 359, 135 Am. St. Rep. 622, 106 Pac. 1098; *Anderson v. Burchett*, 48 Kan. 781, 30 Pac. 174; *Mayer v. Mayer*, 27 Or. 133, 39 Pac. 1002; *Welch v. Ladd*, 29 Okl. 93, 116 Pac. 573; *Fowler v. Continental Casualty Co.*, 17 N. M. 188, 124 Pac. 479; *Seclurity Loan & Trust Co. v. Boston etc. Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; 2 R. C. L. 336.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant has appealed from an order of the district court of Cascade county denying his motion to set aside a judgment entered against him after his default.

The complaint was filed on May 6, 1914. It contains three causes of action. Two of them are for the recovery of money under the terms of a written contract. The third is for specific performance of an agreement by defendant, embodied in the same contract, to convey to plaintiff certain land. In entering the judgment no relief was granted under the third cause of action. It was thus eliminated from the case. Upon the issuance of summons an affidavit for attachment was filed with the clerk, and an attachment was issued and served by a levy by the sheriff upon real estate belonging to the defendant. The defendant being absent from the state and the sheriff not being able to find him, service of the summons was made by publication. The order of publication was made by the clerk on May 13. Upon proof of service, the default was entered on October 7. Judgment was entered on January 29, 1916. The motion to set aside the default and vacate the judgment was filed with the clerk on July 25, 1916. The grounds of the

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motion were that the defendant had not been personally served with summons; that he was not aware of the commencement of the action until after judgment had been entered, and that the judgment was taken against him through his excusable neglect. He tendered an answer and asked leave to file it. It was verified by one of his attorneys who resides at Spokane in the state of Washington, the reason for his verifying it being that the defendant was absent from the county of Cascade, state of Montana, at the time the verification was made. In support of the motion, defendant also filed his affidavit, in which among other things, he stated that he had not known of the commencement of the action until judgment had been entered against him; that he had read the complaint; that he had "stated his defense" to his attorney, and had been advised by him that he had a good and meritorious defense thereto; and that, if he had known of the pendency of the action, he would have caused his appearance to be made therein and interposed his defense. It contained no other statement of facts tending to explain or excuse his failure to appear and make his defense. The plaintiff resisted the motion by filing counter-affidavits, among others one by George A. Judson, Esq., who was attorney for the plaintiff at the time the action was commenced and when judgment was entered. To this affidavit is attached a copy of a letter written by the defendant to the affiant on July 31, 1915, from which it appears that at that time he had full knowledge of the pendency of the action, and the relief sought therein by the plaintiff, for in this letter he requested the affiant to mail to him copies of all the records and files in the case so that he could have them examined by his attorney.

The motion was called to the attention of Honorable H. H. Ewing, the judge presiding in Department No. 2 of the court, on August 19, 1916. Judge Ewing declined to take any action upon it for the reason that all the prior proceedings in the case, including the rendition of judgment, had been had in Department No. 1 before Honorable J. B. Leslie, who presided in that

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department. It was then stipulated by counsel that the motion should be submitted to Judge Leslie, who was then absent from the district, upon briefs to be thereafter prepared. Defendant filed his brief, but counsel for plaintiff did not. The motion remained in this condition until April 11, 1919, when, upon notice by counsel for plaintiff, it was submitted for final determination. Judge Leslie overruled it on the ground that the defendant had been guilty of inexcusable delay in prosecuting it.

Defendant contends that the judgment is void on its face for the reason that the contract made the basis of the action, is not "a contract, express or implied, for the direct payment of money," within the meaning of section 6656 of the Revised Codes, as construed by this court in *Carter v. Bankers' Ins. Co.*, 58 Mont. 319, 192 Pac. 827, and other cases; that the issuance of the attachment by the clerk was wholly unauthorized; and hence the court was without jurisdiction to render the judgment upon proof of a constructive service of summons and should have set it aside.

Plaintiff contends that though the attachment was wholly unauthorized, and though the judgment, when rendered, was void because the court had no jurisdiction over the attached property to enable it to render judgment, nevertheless, by his application, the defendant did not challenge the jurisdiction of the court, but asked for specific relief on a ground which appealed to its discretion, and, having thus assumed that it had jurisdiction, he cannot now assert the contrary.

It may be remarked, in passing, that no contention is made by the defendant that the complaint does not state a *cause* of action. The contention he makes is that it does not state a case warranting the issuing of an attachment. It may be said in this connection that the allegations contained in the first and second causes of action are sufficient in form and substance to warrant recovery by the plaintiff of the amounts demanded therein.

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If it be conceded, for the sake of argument, that the contract [1,2] does not come within the purview of the statute, and that the attachment was wholly unauthorized, the result was that, since the service was constructive, the property was not brought by the attachment within the jurisdiction and control of the court; for, the process being unauthorized, it was void, with the result that the judgment was also void for want of personal notice to the defendant. The rule is well settled that a judgment rendered upon constructive service, when property of the defendant is not within the jurisdiction and control of the court, is a nullity, because the judgment, under the circumstances, is one *in personam*, and such a judgment cannot be rendered upon constructive service alone. This subject was elaborately discussed by this court in the case of *Silver Camp Min. Co. v. Dickert*, 31 Mont. 488, 3 Ann. Cas. 1000, 67 L. R. A. 940, 78 Pac. 967, and the conclusion announced therein has since been deemed to have settled the rule in this jurisdiction. (*Thrift v. Thrift*, 54 Mont. 463, 171 Pac. 272.)

We think, however, that notwithstanding this rule the [3,4] contention of counsel for plaintiff must be sustained. When a defendant desires to challenge the jurisdiction of the court over his person on the ground that there has been no valid service of summons, he must restrict his challenge to that ground only, and keep out of court for all other purposes. In other words, he must make a special appearance to challenge the jurisdiction of the court for want of personal service of process. It is of no moment whether he designates his application a "special appearance" or not, if it presents only questions of jurisdiction. If, however, in addition to challenging the jurisdiction he asks specific relief on one or more grounds which can be urged only upon the hypothesis that the court has jurisdiction of the cause and person, he thereby submits himself to the jurisdiction of the court as completely as if he had been regularly served with process. The rule on this subject is well stated at page 625 of 2 Ency. Pl. & Pr., as follows: "The principle to be extracted from the decisions on the subject as

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to when a special appearance is converted into a general one is that, where the defendant appears and asks some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, it is a submission to the jurisdiction of the court as completely as if he had been regularly served with process, whether such appearance, by its terms, be limited to a special purpose or not. Where a party appears in court and objects by motion to the jurisdiction of the court over his person, he must state specifically the grounds of objection. By not so stating them his appearance will be construed a general one, although he moves to dismiss on that ground." The rule is supported by a number of cases cited by the author in the notes, all of which upon examination, we find to support the text. The following are also directly in point: *Stubbs v. McGillis*, 44 Colo. 138, 130 Am. St. Rep. 116, 18 L. R. A. (n. s.) 405, 96 Pac. 1005; *Ryan v. Driscoll*, 83 Ill. 415; *Simmons v. McCullin*, 163 N. C. 409, Ann. Cas. 1915B, 244, 79 S. E. 625; *Marsden v. Soper*, 11 Ohio St. 503; *French v. Ajax Oil Dev. Co.*, 44 Wash. 305, 87 Pac. 359; *Stuyvesant v. Weil*, 26 Misc. Rep. 445, 57 N. Y. Supp. 592; *Mayer v. Mayer*, 27 Or. 133, 39 Pac. 1002; *Security L. & Tr. Co. v. Boston & S. R. F. Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296; *Welch v. Ladd*, 29 Okl. 93, 11 Pac. 573; *Fowler v. Continental Gas. Co.*, 17 N. M. 188, 124 Pac. 479.

In 2 Ruling Case Law, we find the rule stated as follows: "A defendant making a special appearance for the sole purpose of questioning the jurisdiction of the court over his person does not, in the absence of statutory provisions to the contrary, waive any objection to the jurisdiction. This is the purpose of a special appearance, and all such questions may be subsequently raised in other proceedings. Thus where an order for publication of summons has been made in an action over the subject or cause of which the courts of the state have no jurisdiction, the defendant is entitled to appear specially in order to make a motion to set the summons aside, rather than submit to the hardship of coming in to defend the action. By a general ap-

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pearance the defendant submits his person to the jurisdiction of the court. If he has made no previous objection to the process or return, his conduct amounts to a waiver of process, defects in process, defects in return, and even total want of service. It has been said that this is not only decided law, but good sense." (Page 335.) This court heretofore recognized and applied the principle underlying the rule. (*Gage v. Maryatt*, 9 Mont. 265, 23 Pac. 337; *State ex rel. Mackey v. District Court*, 40 Mont. 359, 135 Am. St. Rep. 622, 106 Pac. 1098.)

It may be noted that neither ground of the motion presented the question of jurisdiction. The first ground was merely informational in character, since it only served to bring to the notice of the court the fact that the defendant had not been personally served with process, and hence that the motion had been timely made within the provision of the last sentence of section 6589 of the Revised Codes. The other ground could not have been urged at all, except upon the hypothesis that the judgment was valid, and that it was within the discretion of the court to let in the defendant to make his defense on the merits because his failure to appear sooner was excusable. It constituted a general appearance, precluding the defendant from asserting then or now that the court had no jurisdiction to render the judgment.

Furthermore, there was no merit in the motion. The defendant, with knowledge of the pendency of the action as early as July 31, 1915, took no step looking to a defense on the merits until July 25, 1916, about seven months after the judgment had been rendered and entered. Then, after filing his motion with the clerk, he let it lie without further action until April 11, 1919. Under these circumstances, we are of the opinion, as was said by Judge Leslie in denying the motion, that aside from other questions urged by the plaintiff against the defendant, such delay in bringing on the motion for hearing did not permit the court to grant the defendant relief. The delay, both before and after the entry of judgment, was wholly

without excuse. (*Smith v. Collis*, 42 Mont. 350, Ann. Cas. 1912A, 1158, 112 Pac. 1070.)

The order is affirmed.

Affirmed.

ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

MR. JUSTICE COOPER, deeming himself disqualified, takes no part in the foregoing decision.

WHITE BEAR, APPELLANT, v. BARTH ET AL., RESPONDENTS.

(No. 4,535.)

(Submitted October 27, 1921. Decided November 21, 1921.)

[203 Pac. 517.]

*Contracts—Invalidity—Public Policy—Corrupt Use of Money
—Personal Influence Over Indians.*

Indians—Grazing Contracts—When not Subject to Review.

1. Under the Act of Congress approved February 28, 1891 (26 Stats. at Large, 795), Tribal Indians are given primary authority to lease lands owned by them for grazing purposes, the determination of their council being conclusive upon the federal government in the absence of evidence of fraud or undue influence.

Contracts—Indians—Grazing Contracts—Corrupt Use of Money—Invalidity—Public Policy.

2. A contract between an Indian and livestock men, under which the former agreed by the corrupt use of money to influence the members of his tribe toward preventing a certain person from receiving a lease of their lands for grazing purposes; to incite them to demanding the cancellation of other leases, without reference to the merits of the case and upon unverified statements of his employers; to prevent the cancellation of a lease to one of the latter in face of the fact that the government had just cause for canceling it, and to keep him on the reservation in defiance of an order canceling his lease and directing his removal, etc., was void as against public

2. When contract void because for services forbidden by public policy, see note in 66 Am. Dec. 505.

Validity of contract which contemplates the violation of a contract with a third person, see note in 11 A. L. R. 706.

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policy, it being immaterial that the resulting action by the Indians may not have led to injury or may have been for the best interest of the Indians.

Same—Grazing Contracts—Personal Influence Over Indians—Invalidity—Public Policy.

3. A contract under which an Indian—who was a grandson of a former chief of his tribe and had been educated at Carlisle, who acted as interpreter for the Indians, was a regular attendant at their council meetings, prominent in tribal affairs and had great influence with them, being generally successful in having his views adopted even against pronounced opposition, was to exercise his personal influence with the Indians to obtain action favorable to his employers in the matter of leases of land for grazing, was void as against good morals and sound public policy.

Appeals from District Court, Yellowstone County; Chas. A. Taylor, Judge.

ACTION by Russell White Bear against Anna Barth, executrix of the estate of A. H. Barth, deceased, and Charles McDaniels. From a judgment for defendants, and from an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Mr. E. E. Enterline and *Messrs. Reynolds & Shea*, for Appellant, submitted a brief, and one in reply to that of Respondents Barth; *Mr. Enterline* argued the cause orally.

Contracts which do not involve personal solicitation and influence to the extent of seeking to bring pressure to bear upon legislative or departmental action and which only seek to procure and present in a fair and candid way the facts for such legislative and departmental action are valid. (2 Elliott on Contracts, secs. 1040, 1046, 1049, 1050; 8 *Id.*, sec. 1046; 6 R. C. L., secs. 137–139.)

In a case considered by the supreme court of California, the defendant had a claim pending before the secretary of interior for timber-land entries. The matter had been long delayed in the land department, whereupon the defendant employed plaintiff as an attorney for the purpose of having said

3. Validity of contract to influence, by apparently disinterested advice, the conduct of a third person to whom the promisor owes no contractual duty, see note in L. R. A. 1917F, 468.

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entries ratified. It was held that employment of persons to influence decisions in a proper way was not against sound public policy. It was further held that the means and methods used must be improper, or else such employment would be perfectly legitimate. (*Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784.)

An agreement between attorney and client for professional services to be rendered by the former in collecting facts, preparing and submitting to the proper authorities of the United States government arguments upon the merits of those holding Indian lands purchased from the government for a reduction and upon the justice and advisability of such reduction of the purchase price of such lands, is valid and enforceable. (*Stroe-mer v. Van Orsdel*, 74 Neb. 132, 121 Am. St. Rep. 713, 4 L. R. A. (n. s.) 212, 103 N. W. 1053, 107 N. W. 125; see, also, *Houlton v. Nichol*, 93 Wis. 393, 57 Am. St. Rep. 928, 33 L. R. A. 166, 67 N. W. 715; *Obenchain v. Ransome-Crummey Co.*, 69 Or. 547, 138 Pac. 1079, 139 Pac. 920; *Haley v. Hollenback*, 53 Mont. 494, 165 Pac. 459; *Spaulding v. Maillet*, 57 Mont. 318, 188 Pac. 377; *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063.)

The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. (*Cole v. Brown-Hurley Hardware Co.*, 139 Iowa, 487, 16 Ann. Cas. 846, 18 L. R. A. (n. s.) 1161, 1164, 117 N. W. 746.) There was no evidence tending to prove or establish the fact that the contract of employment between appellant and respondents contemplated such action as contravened sound public policy. If the evidence in the case raised a question of its illegality, then such question should have been submitted to the jury for its consideration. (*Obenchain v. Ransome-Crummey Co.*, *supra*; *Mulligan v. Smith*, *supra*; *Chard v. Ryan-Parker etc. Co.*, 182 App. Div. 455, 169 N. Y. Supp. 622.)

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Messrs. Gunn, Rasch & Hall, Mr. M. J. Lamb and Messrs. Burkheimer & Burkheimer, of the Bar of Seattle, Washington, submitted an original and a supplemental brief in behalf of Respondents Barth; *Mr. Carl Rasch* argued the cause orally.

Contracts which expressly or impliedly contemplate the employment of corrupt or otherwise improper methods to influence the official conduct of legislators or others charged with public duties, or the purpose of which is to secure the action of one of the parties thereto to influence and induce a third person, imposing confidence in such party and believing that he is disinterested, to do some act or thing from which the party exercising the influence or persuasion will receive some benefit or advantage unknown to the person whose action is thereby secured, are void as against public policy. (2 Elliott on Contracts, secs. 1040 *et seq.*; *Providence Tool Co. v. Morris*, 2 Wall. (U. S.) 45, 17 L. Ed. 868; *Hyland v. Oregon Hassan Paving Co.*, 74 Or. 1, Ann. Cas. 1916E, 941, L. R. A. 1915C, 823, 144 Pac. 1160; *Hazelton v. Sheckells*, 202 U. S. 71, 6 Ann. Cas. 217, 50 L. Ed. 939, 26 Sup. Ct. Rep. 567 [see, also, Rose's U. S. Notes]; *Chippewa Valley & S. Ry. Co. v. Chicago, St. P. M. & O. Ry. Co.*, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. 17; *Houlton v. Dunn*, 60 Minn. 26, 51 Am. St. Rep. 493, 30 L. R. A. 737, 61 N. W. 898; *Hayward v. Nordberg Mfg. Co.*, 85 Fed. 4, 29 C. C. A. 438; *Torpey v. Murray*, 93 Minn. 482, 101 N. W. 609; *Simon v. Garlitz*, 63 Tex. Civ. 172, 133 S. W. 461; *Langdon v. Conlin*, 67 Neb. 243, 108 Am. St. Rep. 643, 60 L. R. A. 429, 93 N. W. 389; *Ridgely v. Keene*, 134 App. Div. 647, 119 N. Y. Supp. 451; *Alpers v. Hunt*, 86 Cal. 78, 21 Am. St. Rep. 17, 9 L. R. A. 483, 24 Pac. 846.)

Under section 4218, United States Compiled Statutes (3 Fed. Stats. Ann., 2d ed., 837), the bestowal of grazing privileges upon anyone within Indian reservations required affirmative and favorable action by three separate and distinct governmental agencies, to-wit: The Indians, speaking through their

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council, the agent in charge of the reservation, and the secretary of the interior. To incite the exercise of the authority conferred, and the performance of duties imposed upon either one or any of these governmental agencies, whose consent and co-operation are required, by improper means, methods or influences, renders the transaction illegal and void, and subjects to the penalties of a criminal offense the parties engaged in such an undertaking. (*Sharp v. United States*, 138 Fed. 878, 71 C. C. A. 258.)

It is settled law in this country that agreements "to influence" legislation, although the legislation sought may be clearly beneficial; agreements to use "personal influence, importunity," bribery or corruption to obtain or "prevent" legislation, and agreements to procure by bribery or "secret influence" a government contract from an officer charged with the letting or making of the same, are each and all against public policy and void. (18 Corpus Juris, secs. 360, 368, 371; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539 [see, also, Rose's U. S. Notes]; *Weed v. Black*, 2 McAr. (9 D. C.) 268, 29 Am. Rep. 618; *Owens v. Wilkinson*, 20 App. Cas. (D. C.) 68.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff alleges in his complaint that between July 28, 1915, and October 15, 1917, he performed work and labor for the defendants at their instance and request as a special agent in procuring the cancellation and reletting of leases for range purposes, in ousting incumbent lessees upon the Crow Indian reservation, and in resisting cancellation of a lease held by the defendant Charles McDaniels; that defendants promised and agreed to pay him a reasonable sum commensurate with the value of the services rendered, together with all expenses and fees of assistants; that the services rendered were of the reasonable value of \$20,000, no part of which has been paid, although

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defendants have from time to time paid his traveling and hotel expenses and charges of assistants.

The separate answer of each of the defendants is in effect a general denial of all the material allegations of the complaint. Each of the defendants admits that from time to time he advanced certain sums of money to the plaintiff, but as gratuities only.

Upon the trial, and at the conclusion of all the testimony, the court directed a verdict for the defendants, and judgment was entered thereon dismissing the complaint. From that judgment and from an order denying a new trial, plaintiff appealed. After the appeals were perfected defendant Barth died, and his personal representatives were substituted.

In 1915 three parcels of Indian lands on the Crow reservation were leased to stockmen for grazing purposes. Each of these parcels is designated by the corresponding number of the lease. Lease 3 covered about 300,000 acres, lease 4 about 400,000 acres, and lease 5 about 250,000 acres. It is not made certain who held leases 3 and 4, but lease 5 was held by F. M. Heinrich. All of these leases would expire in February, 1916, and it was the policy of the government to advertise for bids for new leases, some time in advance of the expiration of the old leases.

According to plaintiff's testimony, he was employed by McDaniels in 1915, and that employment was confirmed or a like employment made by Barth in 1916. Although the testimony given by the plaintiff in his case in chief covers 200 pages of the printed transcript, he does not anywhere undertake to tell what were the terms of his contract of employment. Each of the defendants denied that he ever employed plaintiff for any purpose whatever, so that, if the existence of the contract be conceded for the purpose of argument, its terms can be deduced only from what the plaintiff testified that he did in pursuance of it. He testified that he met McDaniels first at Crow Agency in July, 1915, about the time a general council of the Indians was to be held; that McDaniels represented that Heinrich was

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overstocking the range and was not paying enough for lease 5, and that he (McDaniels) was able and willing to pay more, if plaintiff would use his influence to have Heinrich eliminated; that McDaniels solicited his assistance and agreed to pay him for the services rendered; that he accepted the employment and in pursuance thereof went among the Indians, talked with them about the matter, and spent \$300 given to him by McDaniels in entertaining the Indians; that his employment contemplated that he should use his "influence at the council to get Heinrich eliminated," and the result was that the council voted that Heinrich should not again receive a lease for Indian lands. Plaintiff testified further that, when the new bids were received, Lee Simonsen was awarded leases 3 and 4, and Heinrich was the highest bidder for lease 5; that the government referred the Heinrich bid back to the Indians in council in November, 1915, for reconsideration, and again he went among the Indians and worked with them, spending \$200 furnished by McDaniels for that purpose, in entertaining members of the tribe and giving money to some of the Indians outright. He was then asked: "Q. What was your purpose in giving this money to the Indians; what good did you feel it was going to do you? A. It would have influence. Q. They would feel more kindly to you and your propositions you advanced? A. Yes, sir." He testified further that McDaniels told him what to say to the Indians, "to go right on and influence the Indians to be at the meeting, and, while the discussion was on, to protest against Heinrich's bid." The result of that meeting was that the council adhered to its former decision and refused to permit Heinrich to secure a lease, and lease 5 was awarded to McDaniels. Plaintiff testified: "I got him on No. 5, and I made it available with my influence and efforts." He testified further that McDaniels represented that Barth was backing him; that Barth wanted leases 3 and 4 and wanted Simonsen's leases canceled "because Simonsen violated his contract"; that about May, 1916, he (plaintiff) met Barth, and Barth then stated that he wanted to get leases 3 and 4, particularly 4; that

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Simonsen had violated his contract; that it would be easy to have the Indians pass a resolution calling for the cancellation of the Simonsen leases, and that he (Barth) would then be able to get what he wanted; that Barth stated further that he had employed McDaniels to collect data; that he wanted plaintiff to work for him "to secure Nos. 3 and 4"; and that, if he (Barth) could get those leases for five years, he could make a million dollars. Plaintiff testified further that soon thereafter he and another Indian, Frank Yarlott, went to Washington, D. C., and appeared before the senate committee on Indian affairs and "had special legislation enacted that the Crow Indians have general council without interference by the government employees"; that he also sought and secured from the senate committee an order for a delegation of Indians to go to Washington to present their argument in favor of the cancellation of Simonsen's leases; that, before he and Yarlott started for Washington, he secured a letter of introduction from Mr. Arthur, of Billings; and that Barth bought both railroad tickets and gave to plaintiff \$300. Asked by his counsel what he did by way of carrying out his contract of employment, plaintiff testified that he devoted all of his time going about over the reservation, visiting the different Indians, and presenting to them Barth's contention that Simonsen was not paying enough rental and was permitting Heinrich to run cattle on 3 and 4, and that Barth would pay more if the Simonsen leases were canceled. Plaintiff was asked by his counsel, "You may tell the jury whether you continued at that time to use your influence among the Indians for the purpose of having these Simonsen leases canceled," to which he replied, "Yes, sir." He testified further that he secured the Indians to sign and send to the Senate committee on Indian affairs a petition for the cancellation of the Simonsen leases; that he personally went to Washington after July 15, 1916, and that Barth paid his expenses; and that later in the same year he went again to Washington as a delegate selected by the Indians to appear before the senate committee. Concerning this, he was asked

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by his counsel, "What acts, if any, were done by either Barth or McDaniels in aiding you to be a delegate next time?" to which he replied, "Well, I, as usual—I entertained the Indians with the money furnished me by Mr. Barth or McDaniels; I visited the different parts of the reservation and carried out the purpose." He testified further that the Simonsen leases were canceled about September, 1916; that Dana and Long were thereafter awarded leases 3 and 4; and that immediately he went to work, under the direction of Barth, to secure the cancellation of the Dana-Long leases, upon the representation of Barth and McDaniels that the new lessees "stood in with Mr. Heinrich," and to that end he made a trip to Washington. He testified further that the McDaniels lease on No. 5 was for two years from February, 1916, with the option for three years additional if the Indians approved it; that soon after McDaniels went into possession under lease 5 he became involved in trouble over it and efforts were made to have the lease canceled; that a government inspector was sent to the reservation to investigate McDaniels' operations, and that he (plaintiff) spent some time checking up this government inspector while he was engaged in his work; that McDaniels desired to secure the extension of his lease; that at the solicitation of McDaniels and Barth he (plaintiff) worked among the Indians and with the Indian department to prevent the cancellation of the McDaniels lease; that he circulated a petition and secured the signatures of the Indians for the extension sought by McDaniels, forwarded this petition to Washington, and afterward made two trips there in that behalf; that on one of these trips other Indians went with him. He testified: "Through my influence or through my efforts they went to Washington with me to present the matter to the office." He testified further that the McDaniels lease was canceled in the summer of 1917 and McDaniels ordered off the reservation, but that, through his influence with the Indians, McDaniels was permitted to remain there for a considerable period of time. He testified: "Well, Mr. McDaniels failed to have his leases

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extended, but if it wasn't for my efforts among the Indians he would have been ousted immediately, and he would have lost thousands and thousands of dollars." And again: "I did prevent him from being ousted at the time they wanted him off." He testified that during his employment he sent several telegrams to officials in Washington, and that Barth paid the expense of transmission in each instance; that upon one occasion, at the solicitation of Barth, he (plaintiff) procured Chief Plenty Coos to go to Billings and to sign and send a telegram to Commissioner Sells and one to Senator Ashurst; that Barth paid the expenses of transmission in each instance, and, in addition thereto, gave Plenty Coos \$300. He testified that he never made any investigation as to the truth or falsity of the representations made to him by Barth or McDaniels, but accepted them as true, and that he concealed from the Indians and the officials at Washington, or at least did not disclose and was afraid to disclose to them or any of them that he was in the employment of these defendants.

The evidence of plaintiff shows that during about six months of the year 1917 McDaniels furnished to him \$2730 and several hundred dollars during the two preceding years; that Barth also furnished several hundred dollars to him and directed him to call upon Mr. Arthur for money in case he (Barth) should be absent, and that he did call upon and receive money from Arthur many times. He testified that McDaniels deposited money in a bank at Hardin upon which he (plaintiff) was authorized to draw his checks; that he did not keep any memorandum of his expenses, and was not required to make any accounting. He testified that he used all of the money; that he paid railroad fare for Indians coming to and returning from council meetings, paid for their meals and other expenses; that upon one occasion he purchased for the Indians a complete baseball outfit at an expense of about \$50. He was not able to account for all of the money by distinct items, but concerning it he said: "I know I have spent it with the Indians, given it to the Indians and for expenses." In his testimony he

accounts for more than \$4,000 which he had received and refers to various other sums of which he could not give any account whatever.

Under an Act of Congress approved February 28, 1891 (26 [1] Stats. at Large, 795), lands owned by Indians and not needed for agricultural purposes may be leased "by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the secretary of the interior." (Sec. 3 (3 Fed. Stats. Ann., 2d ed., p. 837; U. S. Comp. Stats., sec. 4218.) From the language of this statute it appears reasonably certain that it was the legislative purpose to confer primary authority upon the Indians, and that the determination of the council should be conclusive upon the government, at least in the absence of any evidence of fraud or undue influence. This was understood by the parties, and particularly by the plaintiff, for he testified that no one could get a lease over the objections of the Indians.

If we assume for the purposes of this case that plaintiff was [2] employed by the defendants, the determinative question then arises: What were the terms of the contract of employment, or what was he employed to do? As we have observed heretofore, this question can be answered only by reference to the testimony concerning the things which he did. In the absence of any evidence to the contrary, we must conclude that whatever he did was within the scope of his employment; that he was employed to do just what he did do.

Measuring the terms of the contract by plaintiff's activities, we find: (1) He was employed to exert his influence with the Indians to prevent Heinrich receiving a lease of Indian lands and to augment his influence, by the expenditure of money furnished by McDaniels, in entertaining the Indians, paying their expenses, and courting their favorable consideration of the plan. (2) He was employed to distribute money (provided

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by McDaniels) among the Indians for the purpose of influencing them and making them feel more kindly towards his proposition, which was that the Indians should adhere to their former resolution that Heinrich should be excluded from leasing, although he was the highest bidder. (3) He was employed to incite the Indians to demand the cancellation of Simonsen's leases, without reference to the merits of the case and solely upon the unverified statements of Barth and McDaniels. (4) He was employed to prevent the cancellation of McDaniels' lease independently of the fact that the government discovered just cause for canceling it. (5) He was employed to keep McDaniels on the reservation in defiance of the government's order, made after investigation, canceling the McDaniels lease and directing McDaniels to remove from the reservation. (6) He was employed to work for the cancellation of the Dana-Long leases upon the uninvestigated charges of Barth and McDaniels. No court of any civilized country will lend its aid to enforce contracts for the corrupt use of money to influence action on the part of those having favors to bestow or withhold, and it is altogether immaterial that the resulting action may not lead to injury or that it may be for the best interest of all parties concerned. The law looks to the evil tendency of such agreements and closes the door to temptation by refusing them recognition in any court.

Counsel for plaintiff cite and rely upon the case of *Obenchain v. Ransome-Crummey Co.*, 69 Or. 547, 138 Pac. 1078, 139 Pac. 920, but the decision furnishes no consolation for them. Obenchain sued to recover compensation for services in securing for the Ransome-Crummey Company contracts for street improvement in Medford and Klamath Falls, Oregon. It was developed upon the trial that he had expended over \$200 in entertaining councilmen of the cities, purchasing for them liquor, theater tickets, etc. The court said: "Now, if the testimony shows that the defendant, when it hired plaintiff, contemplated or intended that he should expend money for such purposes, the contract of hiring was illegal and void, and, irrespective of

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the condition of the pleadings, it would have been the duty of the court so to declare it and dismiss the case." The court found, however, that the "expense money" allowed to Obenchain was intended only to cover legitimate expenses, and that the use of money for the entertainment of public officials was not contemplated by the parties when the contract of employment was made. Cases, almost without number, could be cited in support of the views which we have indicated. It will suffice to refer to them as they are collated in the notes to sections 361-371, 13 Corpus Juris, pages 426-434.

Again, we need not stop to inquire whether the Indian council is technically an agency of the general government; for it follows from the fact that the council is vested primarily with the authority to determine who may and who may not lease Indian land, that anything done, the tendency of which is unlawfully to influence the determination of the council, must of necessity impair, obstruct, or defeat the proper functions of the government in supervising the interests of its wards, and any contract which looks to such purpose is condemned by every dictate of good morals and every principle of sound public policy, if, indeed, it does not evidence a criminal conspiracy within the purview of section 5440, United States Revised Statutes (7 Fed. Stats. Ann., 2d ed., p. 534; U. S. Comp. Stats., sec. 10201), as construed in *Haas v. Henkle*, 216 U. S. 462, 17 Ann. Cas. 1112, 54 L. Ed. 569, 30 Sup. Ct. Rep. 249 [see, also, Rose's U. S. Notes.]

From still another viewpoint the contract in question is void. [3] To appreciate fully the plaintiff's testimony, the situation of the parties at the time the agreement was made must be understood. Barth and McDaniels desired to secure leases upon Indian lands. They knew or were charged with knowledge that the approval of the Indians in council would receive recognition by the Interior Department, and therefore they desired above all things else to bring influence to bear upon the members of the tribe that would result favorably to them. White Bear was a citizen of the United States, educated at Carlisle,

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where he attended school for practically four years, leaving only a few months before he would have graduated to enlist in the army. He was in the army for three years and saw service abroad in Cuba and Porto Rico. He is a grandson of a former head chief of the Crow Tribe, speaks the English language fluently, and understands it readily. He was an interpreter for the Indians, a regular attendant upon the council meetings and prominent in all tribal affairs. To use his own language, he "was one of the spokesmen of the council." He had been before the department at Washington and before the congressional committee many times, was acquainted with the officials of the department and with senators, members of the committee on Indian Affairs; was well acquainted with the Indians and with conditions on the reservation. His influence with the members of the tribe is attested by the fact that he was generally successful in having his views adopted, even in the presence of pronounced opposition. Under these circumstances, there is not any room for doubt that it was his personal influence for which the defendants contracted primarily, that influence to be reinforced by corrupt use of money. For this additional reason the contract is void. (*Spaulding v. Maillet*, 57 Mont. 318, 188 Pac. 377.)

The trial court held that the contract violates the public policy of this state, and with that conclusion we agree. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER and GALEN concur.

MR. JUSTICE REYNOLDS, being disqualified, takes no part in the foregoing decision.

FERRY & CO., RESPONDENT, v. FORQUER, APPELLANT.

(No. 4,549.)

(Submitted October 27, 1921. Decided November 21, 1921.)

[202 Pac. 193.]

*Conversion—Contracts—Interpretation—Bailment.***Contracts—Interpretation.**

1. A contract must receive such interpretation as will give effect to the intention of the parties at the time of contracting, the intention to be gathered from the entire agreement, its substance rather than its form being controlling.

Bailment—Definition.

2. A bailment is a delivery of personal property to another in trust upon a contract, express or implied, that the identical thing bailed, or the product of or substitute for that thing, together with the increments, earnings or gains accruing during the period of bailment, shall be redelivered, delivered over or accounted for by the bailee in accordance with the terms of the contract, as where goods or chattels are delivered for the purpose of having something done about them for a reward to be paid by the bailor to the bailee.

Conversion—Crops—Seed Contract—Bailment.

3. *Held*, in an action for the conversion of a crop of beans grown and harvested by defendant under a contract which provided that defendant should plant a certain acreage with seed furnished by plaintiff and deliver the crop to the latter, he to receive as full compensation a given price per pound, title to the seed and the crop to be in plaintiff until the crop was rejected for reasons mentioned, when title was to vest in defendant, that the transaction was a bailment and not a sale.

Appeals from District Court, Yellowstone County; A. C. Spencer, Judge.

ACTION by D. M. Ferry & Co. against Claud E. Forquer. From judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Messrs. Shea & Wiggernhorn, for Appellant, submitted a brief; *Mr. Thos. F. Shea* argued the cause orally.

It is the contention of defendant that the contract does not establish title in plaintiff and that, since the only evidence

2. Difference between bailment and sale, see notes in 10 Am. Dec. 490; 2 Am. St. Rep. 711; 94 Am. St. Rep. 216.

3. Contract for crops to be raised as a sale, see note in 14 L. R. A. 233.

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on the question of title is contained in the terms of the contract, there has been a failure to establish title and consequently that plaintiff has failed to establish his action. If we are to be guided by this provision alone, there is no question but that the title was in plaintiff. However, whether or not such title was in plaintiff is to be determined by the whole contract and not from any single clause or paragraph. (See *Stockton Sav. & Loan Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561.) We admit that there are some distinctions between that case and the present one. But there is one point in that case that would seem to be determining in the case in question, and that is that under both contracts there is an absolute obligation to pay for the crop. From this, it is a reasonable inference that it was the intention of the parties, notwithstanding the contrary expression of the contract, that the title should pass at the time of the delivery of the seed beans, and under such construction there was no bailment, but rather a sale. (3 R. C. L. 74.)

Under the contract in question the seed beans were transferred to the defendant and he was obliged to pay all the expenses in the growing of the crop and was entitled to all of the increase with the exception that he must return the amount of seeds that had been furnished by plaintiff, and that he must deliver the balance to the plaintiff conditionally upon plaintiff paying him a certain price. But the obligation to return a certain kind or quantity was not absolute, for in the event that plaintiff should reject the beans, then plaintiff was obliged to pay for the same. This in itself would take away from the transaction all of the character of a bailment, as one of the essential elements of bailment is that the property itself or property of a similar kind must be returned. (3 R. C. L. 73.)

A substantially identical contract was held to be a sale in *Robinson v. Stricklin*, 73 Neb. 242, 102 N. W. 479. The latter contract stated that the seeds were borrowed, while the contract in question states that the seeds were delivered. In this there can

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be no substantial difference. The provision of the contract as set forth in that case particularly analogous to the contract in question is that in both contracts the right is given to the party furnishing the seed to reject the said seeds if they do not come up to a certain standard. Counsel for plaintiff has endeavored to make the distinction that the contract in question provided for the method in which the seeds are to be determined as satisfactory. However, such is not a meritorious distinction, for the reason that even by following such methods the fact still remains that the seed is not identified, and it cannot be determined what seed is to be delivered until such process is followed. If from such method alone it could be determined what amount of seed or grain was to be delivered to plaintiff, there might be some merit to plaintiff's contention that there is a distinction in the two contracts; but, since even with the methods provided it cannot be determined what amount of seed is to be delivered, there still remains the fact that the seed is not identified, and, as is stated in the Northwestern case, no title can pass until the seed is identified. The contract set forth in the Northwestern case does not contain any provisions authorizing the party furnishing the seed to refuse to accept the same. In this respect it is more favorable to the party furnishing the seed than the contract in this case in question. On the question of necessity of identification of the seed to be delivered, see, also, *Adlam v. McKnight*, 32 Mont. 349, 80 Pac. 613; *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, 9 Am. St. Rep. 199, 18 Pac. 248.

Messrs. Johnston & Coleman, for Respondent, submitted a brief; *Mr. H. J. Coleman* argued the cause orally.

The transaction involved was a bailment, not a sale. "Where articles are delivered by one person to another, who is to perform labor upon them, or to manufacture them into other articles for the former, the transaction is a bailment, notwithstanding the articles are to be returned in altered

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form.” (6 C. J. 1096; *Laflin etc. Powder Co. v. Burkhardt*, 97 U. S. 110, 116, 24 L. Ed. 973, 974 [see, also, Rose’s U. S. Notes]; *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215, 28 N. E. 595; *Sattler v. Hallock*, 160 N. Y. 291, 73 Am. St. Rep. 686, 46 L. R. A. 679, 54 N. E. 667; *Gleason v. Beers*, 59 Vt. 581, 59 Am. Rep. 757, 10 Atl. 86; 1 Mechem on Sales, Chap. II, sec. 19; *Arnott v. Kansas Pac. Ry. Co.*, 19 Kan. 95; *Mack v. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, 35 N. E. 493; *Gilbert v. Copeland*, 22 Ga. App. 753, 97 S. E. 251; *Stewart v. Sculthorp*, 25 Ont. Rep. 544.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Early in 1916 the plaintiff delivered to the defendant a quantity of seed beans to be planted on lands in Yellowstone county, pursuant to the terms of a letter theretofore written by the defendant, the material portions of which follow:

“Messrs. D. M. Ferry & Co., Detroit, Michigan.

“I agree, on the terms and conditions stated below, to raise for you, on lands [describing them] * * * 30 acres Golden Wax beans, 10 acres Giant Stringless Gr. Pod beans.

“I agree properly to prepare and plant such lands with stock seed to be furnished by you free on board cars at Shepherd; to harvest, cure, separate and clean, as well as possible with ordinary farm machinery, its entire seed product, in such manner as to secure the greatest possible return of seed suitable for seedsman’s use; and to sack, and deliver all the seed to you free on board cars at Shepherd as soon as the seed can be put in suitable condition, and before November 30, 1916, without wasting, feeding, selling, reserving or allowing any portion of the crop of seed furnished to pass from my possession except as delivered to you. The stock seed and seed crop produced from it is, and shall remain your property except as otherwise stated in this contract.

“In order to prevent hybridization and to keep the crop pure, I agree that during the life of this contract I will not

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grow seeds of the same species for any other person, and as far as I am able to prevent it, there shall be no other plants of the same species grown within ten rods of this crop. I will take at all times every reasonable precaution to keep the crop pure and to prevent seed of any chance plants of a different variety or of a stock of the same variety different from that sent me by you becoming mixed with seeds grown under this agreement. You or your agents may at any time enter the field and at your own expense make such examination, selections or rejections as you or they deem desirable for the betterment of the crop for seed purposes, and you or they shall not be liable for necessary damage, if any, to my crop resulting from such work.

“ * * * You may refuse to accept the crop if less than eighty-five per cent (85%) of the seeds are vital, or if in your judgment the crop is in any other respect unfit for seedsman's use and cannot be made fit without an unreasonable amount of cleaning or hand picking. * * * In case you refuse to accept the crop, its title shall vest in me and I agree to reimburse you immediately for stock seed and bags furnished, and for all freight charges,” etc.

“In consideration of the faithful carrying out of this agreement by me and as full compensation for my services, you are to pay me at the rate of four and one-half cents (4½¢) per pound for the Golden Wax and four and one-fourth cents (4¼¢) per pound for the Giant Stringless Green Pod Beans when delivered on board car in good condition for all seed (in excess of the stock seed furnished me), delivered under this contract and accepted by you; payment to be made immediately upon your acceptance of the seed. No payment is to be made for any seed which you do not consider sufficiently pure, clean and dry for seedsman's use and no credit is to be given for dirt, or for damaged or poor seed which has to be removed. * * * This letter, when accepted by you, shall constitute our contract, and be construed according to Michigan Laws. There are no agreements or understandings

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regarding the subject matter of this letter other than expressed above.

“Yours truly,

“CLAUD E. FORQUER.”

“Accepted at Detroit, Michigan, this third day of March, 1916.

“D. M. FERRY & Co.,

“By R. H. MOORE.”

This action was brought to recover damages for the alleged wrongful conversion by defendant of the crop of beans grown and harvested, and the controversy presents for determination the question: In which of the parties was the title to the property on December 14 when defendant sold and delivered the crop to a third party? The trial court held that title was in the plaintiff, and directed a verdict in its favor. From the judgment entered thereon and from an order denying him a new trial the defendant appealed.

The acceptance of the terms of defendant's letter by the plaintiff completed the contract between the parties, and constituted the entire agreement. From it the answer to the inquiry above must be sought. It is elementary that a contract [1] must receive such interpretation as will give effect to the intention of the parties at the time of contracting (*Quirk v. Rich*, 40 Mont. 552, 107 Pac. 821), and that the intention is to be gathered from the entire agreement (*Stockton Sav. & Loan Soc. v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561). It is also a rule of general application that it is the substance of the agreement rather than the form—the spirit rather than the letter—which must control its interpretation. (*Liquid Carbonic Co. v. Quick*, 182 Fed. 603, 105 C. C. A. 141.)

Applying these principles to the instrument before us, and [2, 3] there does not appear to be room for a difference of opinion as to the intention of the parties or the character of their transaction. The letter declares that it was the intention that defendant should raise the crop of beans *for the plaintiff*,

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and every other provision but adds emphasis to that purpose. It is argued by counsel for defendant that the provision that plaintiff might refuse to accept the crop, or part of it, is altogether inconsistent with the theory that title was in the plaintiff, but not so. The letter declares that "The stock seed and seed crop produced from it is and shall remain your property except as otherwise stated in this contract." The exception is that plaintiff might refuse to accept the crop if less than eighty-five per cent of the beans should prove to be vital, or if the crop should be otherwise unfit for seedsman's use. In other words, title was in the plaintiff until it rejected the crop for either of the reasons mentioned, and then, and not until then, should title vest in the defendant. The defendant wrote: "In case you refuse to accept the crop, its title shall vest in me." The term "vest," as therein employed, means to descend; to take effect; and the parties intended clearly that upon the happening of the contingency indicated, defendant would acquire something which he did not have before. Again, counsel urge that the provision that plaintiff should pay for the crop in any event is at war with the notion that plaintiff was the owner. The fallacy of this argument lies in the assumption that plaintiff was to pay for the crop. The contract does not so provide. The only reference to compensation in the contract is found in the provision for compensation for the services rendered by the defendant, the amount thereof to be computed upon the amount of the crop produced.

There were not present any of the elements of a sale so far as the seed beans were concerned, not the slightest indication that the title was to be transferred or that defendant should pay for such seed. (Secs. 5079, 5080, Rev. Codes.) Neither was the transaction a loan of the seed for use within the meaning of section 5188, Revised Codes, for defendant was to be rewarded for the use to be made of the seed and, furthermore, a loan for use does not transfer title. (Section 5189, Rev. Codes.)

The contract is one of bailment, and title to the seed and the crop produced was in the bailor. A bailment is a delivery of personal property in trust upon a contract, express or implied, that the trust shall be executed faithfully on the part of the bailee. (2 Blackstone's Commentaries, 451; 2 Kent's Commentaries, 558; Story on Bailments, sec. 2.) Some of the early definitions apparently contemplated that the thing bailed should be returned in specie, but the preponderant authority and better reasoning support the rule that upon the termination of the bailment, the identical thing bailed, or the product of or substitute for that thing, together with the increments, earnings, and gains which may have accrued to it during the period of the bailment, must be redelivered, delivered over, or accounted for by the bailee in accordance with the terms of the contract. (6 C. J. 1139.) The principles of the law of bailments were borrowed from the civil law, and were first tersely explained in the early English case of *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Reprint, 107. In that case Chief Justice Holt classified the different kinds of bailments, and, among other things, said: "The fifth sort is where goods or chattels are delivered to be carried or something is to be done about them for a reward to be paid by the person who delivers them to the bailee who is to do the thing about them." It may be granted that Chief Justice Holt, in thus expounding the common law, did not have in contemplation a seed contract of the character of the one before us, but it is the malleability of the common law, its adaptability to changed conditions, that is its distinguishing characteristic and greatest virtue, and it may be asserted with confidence that the modern law of bailments finds justification in the rules announced in *Coggs v. Bernard* in whatever varied form they may be promulgated. In principle, the transaction between the parties to the present action is not different from that involved where the owner of leather delivers it to a manufacturer to be made into shoes (*Mansfield v. Converse*, 8 Allen (Mass.), 182); or where the owner of logs delivers

them to a miller to be sawed into lumber (*Gleason v. Beers*, 59 Vt. 581, 59 Am. Rep. 757, 10 Atl. 86); or where the owner of milk delivers it to a factory to be made into butter or cheese (*Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681); or where the owner of live animals delivers them to another to be kept for compensation (*Edgar v. Parsell*, 184 Mich. 522, Ann. Cas. 1917A, 1160, 151 N. W. 714; *Robinson v. Haas*, 40 Cal. 474; *Simmons v. Shaft*, 91 Kan. 553, 138 Pac. 614). In any of these cases the transaction is a bailment, and it is altogether immaterial whether the compensation of the bailee is fixed at a definite sum in money or is a share of the product itself, a share of the net proceeds of the adventure, a share of the increase, or is computed upon the product of the undertaking. (6 C. J. 1096.)

But it is urged by the defendant that the contract in question contemplates that he should do more than merely apply his labor to the property furnished by the plaintiff; that he was required to provide the land, and that the elements in the soil entered into the crop to be grown. This may be conceded, but it does not change the rule. So far as the elements which entered into the growing crop are concerned, aside from the defendant's labor, it may be said in all fairness that the plaintiff furnished the principal part—the seed—and that the elements in the soil were merely accessories. In this respect the case is not distinguishable in principle from that which arises when the owner of a damaged or worn-out vehicle delivers it to a blacksmith to be repaired by the labor and material of the latter (*Gregory v. Stryker*, 2 Denio (N. Y.), 628); or when the owner of cloth delivers it to a tailor to be made into a garment, the tailor to furnish the buttons and twist to complete it (Story on Bailments, 8th ed., sec. 423); or when a railway company, the owner of old or worn out rails, delivers them to a rolling mill to be made into new rails by the labor and added material of the mill company (*Arnott v. Kansas P. Ry. Co.*, 19 Kan. 95); or where the owner of rough castings delivers them to be manu-

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factured into shears, the factory to furnish the blades and do the work (*Mack v. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, 35 N. E. 493).

A seed contract, in substantially identical terms with the one before us, was considered by the Queen's Bench Division of the High Court of Justice of Ontario in *Stewart v. Sculthorp*, 25 Ont. 544, and the transaction held to constitute a bailment of the fifth class enumerated by Chief Justice Holt, in *Coggs v. Bernard*, above. And the same result was reached under like circumstances, in *Gilbert v. Copeland*, 22 Ga. App. 753, 97 S. E. 251.

Counsel for defendant cite and rely upon the decision in *Robinson v. Stricklin*, 73 Neb. 242, 102 N. W. 479, but, though the contract there involved is similar to the one before us, it is apparent that the real character of the transaction was not considered or determined. The court assumed that the contract evidenced a sale or was an agreement for sale and, as between the two, it held that it was of the latter class. The subject "bailments" is not mentioned in the opinion, and apparently was not brought to the attention of the court. In a controversy arising upon a contract like the one here involved, the character of the transaction, whether a bailment, a sale, or a contract for sale, must be determined, and to assume that it belongs to one of two of the classes, excluding the other, is to beg the question. We do not deem the Nebraska case authority opposed to the views we have expressed.

The judgment and order are affirmed.

Affirmed. ,

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER and GALEN concur.

MR. JUSTICE REYNOLDS, being disqualified, takes no part in the foregoing decision.

STATE EX REL. O'GRADY ET AL., RELATORS, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 4,982.)

(Submitted October 17, 1921. Decided November 21, 1921.)

[202 Pac. 575.]

*Certiorari—Contempt—Appeal — Abandonment — Jurisdiction
—Stipulations.*

Judgments and Orders—Appeal Removes Cause and Judgment to Supreme Court.

1. An appeal from a judgment automatically removes the action as well as the judgment to the supreme court, thereby divesting the trial court of further jurisdiction over either.

Same—Appeal—Jurisdiction in Trial Court by Stipulation Ineffectual.

2. Where the district court is deprived of jurisdiction of a cause by appeal, the parties cannot by stipulation reinvest such court with jurisdiction.

Same—Appeal—Abandonment Does not Reinvest Trial Court With Jurisdiction—Contempt.

3. A board of county commissioners perfected an appeal from an order of the district court commanding it to pay certain claims. Without dismissing it in the supreme court, it subsequently advised the trial court that it would abandon its appeal. That court thereupon amended the judgment in certain respects and ordered the board to pay the claims. The county clerk instead of delivering the warrants to the claimants as ordered, lodged them with the county treasurer and he refused to pay or register them. They were adjudged guilty of contempt. *Held*, on *certiorari*, that the district court acted in excess of jurisdiction in amending its judgment, and that therefore its order directing payment of the claims was void.

Contempt—Disobedience of Void Order not Contempt.

4. For disobedience of a void order of court, a party cannot be adjudged guilty of contempt.

Original proceedings in *certiorari* by the State of Montana, on the relation of B. K. O'Grady and another, against the District Court of the Twentieth Judicial District in and for the County of Sheridan, and Carl D. Borton, Judge presiding, to review proceedings in which relators were adjudged guilty of contempt. Order annulled.

4. Disobedience of void order as contempt, see note in 16 L. R. A. (n. s.) 1063.

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Messrs. Wheeler & Baldwin, Mr. Alfred T. Vollum, Mr. Arthur C. Erickson and Mr. S. E. Paul, for Relators, submitted a brief; Mr. James S. Baldwin argued the cause orally.

Mr. Howard M. Lewis and Messrs. Hurly, Kline & Slattery, for Respondents, submitted a brief; Mr. Lewis and Mr. John Hurly argued the cause orally.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

Original proceedings in *certiorari*. The record before us is voluminous and most of it unnecessary to be detailed for the purpose of this opinion; hence only so much thereof as is essential to indicate the basis of our conclusion will be given.

It appears that in civil cause No. 3754, *State ex rel. Lockwood v. R. G. Tyler et al.*, commenced in the district court of the twentieth judicial district, in and for Sheridan county, certain proceedings were had wherein an alternative writ of mandate was issued on January 15, 1921, directed to the members of the board of county commissioners, as such board, B. K. O'Grady, clerk and recorder, and D. J. Olson (substituted for Rex M. Movius, his predecessor in office), county treasurer, commanding them to do and perform certain acts in connection with the allowance of the claims of Lockwood and Blakeslee, copartners, against the county. On January 22, the court made and entered its judgment that a peremptory writ of mandate issue against the defendant board of county commissioners, directing the performance of the acts above mentioned, and specifically exempting from the operation of the judgment the defendants O'Grady and Olson. Peremptory writ was issued accordingly. On the same day defendant board of county commissioners served and filed notice of appeal from the judgment to the supreme court, together with the required undertaking. On May 4, L. V. Lockwood filed in the district court his motion to dismiss the appeal of defendant, enumerating many grounds for the

motion, but in general for the reason that the appeal had not been perfected according to law. May 16, the board of county commissioners, defendant, disclaimed any right to further prosecute its appeal by a motion filed for that purpose. On the same day the court made an order amending its judgment of January 22, and required the board to meet on May 27 and perform the acts above specified, and issued peremptory writ in accordance with the terms of the judgment as amended. The order and writ were served upon the members of the board as well as upon O'Grady and Olson. The board met pursuant to the writ, and as commanded, examined, audited, and allowed the claims of Lockwood and Blakeslee, caused warrants, duly signed by the chairman and clerk, to be issued for the various amounts and directed the clerk, O'Grady, to deliver them to Lockwood and Blakeslee. O'Grady, instead, gave the warrants to County Treasurer D. J. Olson, and both O'Grady and Olson refuse to deliver them to Lockwood and Blakeslee, despite their numerous demands. Olson still holds possession of the warrants against the protest of the claimants and refuses to pay or register the same. On July 5, Lockwood filed his affidavit to procure a citation against O'Grady, Olson, and the members of the board, for contempt in violating the order of the court contained in the writ of mandate of May 16; and on July 14 filed an amended affidavit for the same purpose, but urged the theory that they not only violated the provisions of the writ, but interfered with the process of the court. Citation was issued and the charge of contempt submitted to the court upon an agreed statement of facts, supplemented by the oral testimony of J. D. Matkins, a member of the board, resulting in judgment purging the members of the board of contempt, but finding O'Grady and Olson guilty and assessing a fine against each. Original writ of review issued out of this court September 26, 1921, upon relation of O'Grady and Olson, directed against the district court of the twentieth judicial district and Carl D. Borton, judge.

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Reduced to a final summary, relators herein were adjudged [1-4] guilty of contempt for violation of and interference with an order of court made pursuant to a judgment which had been amended by consent of all parties thereto, after an appeal had been perfected to this court from the original judgment. That the order of May 16, amending the judgment of January 22, was "a proceeding in the court below upon the judgment appealed from" and "a matter embraced therein" admits of no doubt. (Section 7106, Rev. Codes.) Appeal had been taken to this court by the service and filing of notice and filing the required undertaking (section 7100, Rev. Codes), and therefore, to all intents and purposes, the action in which the judgment appealed from, and the judgment itself, was no longer in the court below, but automatically was removed here and the lower court thereby divested of jurisdiction over it. The court below and the appellate court cannot exercise jurisdiction at the same time over the same judgment, nor can this court be deprived of its jurisdiction when once acquired, by any act or order whatsoever of the inferior tribunal. Nor can any act or stipulation of the parties themselves in the court below reinvest that court with a jurisdiction which it had lost by virtue of an appeal. The appeal removed jurisdiction of the subject matter to this court and "no agreement of parties can confer upon the court a jurisdiction which is not given by law." (*Wilson v. Davis*, 1 Mont. 98; *Sanders v. Farwell*, 1 Mont. 599; 11 Cyc. 673.)

The order of the court made on May 16 to amend its judgment of January 22, from which appeal had long before been taken, was in excess of its jurisdiction and void (*Hynes v. Barnes*, 30 Mont. 25, 75 Pac. 523, and cases cited), and hence these relators could not be held in contempt for violation of or interference with that order. "A party cannot be guilty of contempt of court for disobeying an order which the court had no authority of law to make." (*State ex rel. Johnston v. District Court*, 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 272; 9 Cyc. 10.)

We therefore recommend that the order of the court below adjudging the relators guilty of contempt be annulled.

ASSOCIATE JUSTICES GALEN, HOLLOWAY and COOPER: For the reasons stated by COMMISSIONER SPENCER, we are of opinion that the order of the court below adjudging the relators guilty of contempt should be annulled, and it is so ordered.

Writ issued.

MR. CHIEF JUSTICE BRANTLY: The conclusion reached by the majority of the court in this case is based upon the assumption that the district court had lost jurisdiction to put the judgment in the *mandamus* proceeding into execution because of the appeal therefrom by the board of commissioners. I am unable to understand, however, why, after an appeal has been perfected from a judgment and nothing else has been done, the appellant may not abandon his appeal and assent to the execution of the judgment as was done in this case. By pursuing this course, the appellant, it seems to me, estops himself to allege want of jurisdiction in the court rendering the judgment to put it in process of execution. If the appellant himself cannot allege want of jurisdiction to execute the judgment, a stranger to it, as the relators were here, cannot be heard to object, nor can he lawfully interfere with the process appropriate to carry it into execution. If he ventures to do so and renders the process nugatory, he is, in my opinion, subject to punishment as for a contempt under the provisions of section 7309 of the Revised Codes. And this is true whether he has been made a party by an amendment of the judgment or not. In my opinion it was entirely unnecessary for the district court to amend the judgment in the *mandamus* proceeding in order to make the relators parties, for without the amendment I think they would have been guilty of contempt in refusing to deliver the warrants to Lockwood and Blakeslee, who were entitled to have the

delivery made, on the theory that their conduct amounted to an unlawful interference with the process of the court within the meaning of the section of the Codes, *supra*.

For this reason, I cannot assent to the conclusion reached in the majority opinion.

BRYSON, ADMINISTRATRIX, RESPONDENT, v. GREAT NORTHERN RY. CO., APPELLANT.

(No. 4,521.)

(Submitted October 26, 1921. Decided November 23, 1921.)

[203 Pac. 529.]

Personal Injuries — Railroads — Control by Director-General of Railroads—Parties—Appeal and Error—Substitution of Party Defendant—Jurisdiction.

Personal Injuries—Railroads While Under Control of Director-general of Railroads—Proper Party Defendant.

1. In an action against a railway company to recover damages for personal injuries suffered during the time defendant company's road was being operated by the director-general of railroads, the proper party defendant was the director-general and not the company.

Same — Judgment Against Improper Party Defendant — Substitution of Proper Party by Supreme Court Unauthorized.

2. Where, in an action against a railway company for damages for the death of a locomotive engineer in a collision at a time when defendant's road was in the possession and control of the director-general of railroads under the Federal Control Act, the defendant company ineffectually endeavored to have the director-general substituted as the proper party defendant, the supreme court, on appeal by the company from a judgment in favor of plaintiff, is without jurisdiction, on motion of plaintiff, to substitute the director-general for the company and affirm the judgment, or order substitution and a new trial, but will reverse the judgment and order dismissal of the complaint.

Appeals from District Court, Flathead County; T. A. Thompson, Judge.

ACTION by Sadie L. Bryson, Administratrix of the Estate of John A. Bryson, deceased, against the Great Northern Rail-

1. Effect of federal control of railroads on action for injury, see notes in 4 A. L. R. 1710; 8 A. L. R. 983; 10 A. L. R. 969.

Substitution of director-general of railroads for carrier company as

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way Company. Judgment for plaintiff, and from it and an order denying a new trial, defendant appeals. Reversed and cause remanded, with direction to dismiss the complaint.

Mr. I. Parker Veazey, Jr., and Messrs. Noffsinger & Walchli, for Appellant, submitted a brief; Mr. Veazey argued the cause orally.

The complaint does not state a cause of action. The only way it can be treated as stating a cause of action is by assuming that the plaintiff used his allegations in regard to the corporation as a fiction authorized by the President as a convenient designation of the government which had directed that its operations should be conducted in this name and that it might be sued in this name. If, however, the plaintiff can successfully maintain that this was not the intention and that he seriously intended to urge that the corporation was the operator and was personally liable, then the complaint does not state a cause of action, for, although it alleges operation by the corporation, the court knows judicially the contrary. The corporation thus could not constitutionally be made responsible for the acts of the government which, by presidential edict, had ousted it of its property. The property of A cannot be taken to respond directly or indirectly for the obligations of B. To hold the corporation liable for the act of the government or its employees after the corporation had been required to dismiss its employees and to yield possession of its railroad would be to take the property of the corporation without due process of law. (*Hatcher & Snyder v. Atchison, T. & S. F. Ry. Co.*, 258 Fed. 952; *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 63 L. Ed. 897, 39 Sup. Ct. Rep. 502; *Rutherford v. Union Pac. R. Co.*, 254 Fed. 880; *Nash v. Southern Pacific*, 260 Fed. 280; *Southern Cotton Oil Co. v. Atlantic etc. Co.*, 257 Fed. 138; *Nueces Valley Townsite Co. v. McAdoo*, 257 Fed. 143; *Mardis v. Hines*, 258 Fed. 945; *Haubert v. Baltimore etc. R. Co.*, 259 Fed. 361; *Schumacker v. Pennsylvania R. Co.*, 106 Misc. Rep. 564, 175 N. Y.

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Supp. 84; *Jackson-Tweed Lbr. Co. v. Southern Ry. Co.*, 113 S. C. 236, 101 S. E. 924; *Harmon v. Hines*, 113 S. C. 179, 101 S. E. 925; *Harmon v. Southern Ry. Co.*, 113 S. C. 188, 101 S. E. 926.)

Messrs. Walsh, Nolan & Scallon, Mr. J. E. Erickson and Messrs. Logan & Child, for Respondents, submitted a reply brief and one on motion to substitute the director-general of railroads for defendant railway company; *Mr. Sidney M. Logan* and *Mr. C. B. Nolan* argued the cause orally.

Before the promulgation of Order No. 50, an inspection of the cases will disclose the most chaotic condition as to how actions should be brought and maintained on account of the operation of the railroads by the government. Sometimes actions were brought against the railroad company and the director-general, and sometimes actions were brought against the companies without this joinder occurring. No particular good can be subserved by referring to these decisions. They are collected and collated in exhaustive notes in the following American Law Reports: 4 A. L. R. 1680; 8 A. L. R. 969; 10 A. L. R. 956, and 11 A. L. R. 1450. See, also, *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 Fed. 774. These conflicting decisions justified the honest belief entertained by counsel for respondent that the action could be maintained against the company, and justified the belief, too, entertained by counsel representing the defendant company, that the action could be maintained as it was, but that the judgment should provide that by reason of its rendition, no personal liability, so far as the company was concerned, should attach, and that the government of the United States should provide for its satisfaction. It is true that after the McAdoo Order No. 50 was promulgated, the legal atmosphere suffered some clarification, and it was then that the defendant company asked that the director-general should be brought expressly into the suit as a party, and that the company should be eliminated entirely. Even then courts were holding that

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this order was invalid, as it was in conflict with the provision of the Act of Congress of March 23, 1918, as this Act required that actions should be conducted against the railway companies. It is well to bear in mind the fact, too, that long before the promulgation of this Order No. 50, a judgment in the instant case was entered. This was the situation when the Ault decision (*Missouri Pac. R. Co. v. Ault*, 256 U. S. 554, 65 L. Ed. 647, 41 Sup. Ct. Rep. 593) was rendered by the supreme court of the United States. The proclamation of the President which provided for the operation of the railroads by the government gave no information as to how actions could be instituted and carried on, and the director-general, until the promulgation of Order No. 50, failed to give any information of this nature. In the instant action, the accident occurred while the government was in control of the road, and, as already stated, the government failed to advise in any way how the action might be maintained against it until Order No. 50 was published. It is true, likewise, that under the Act of March 31, 1918, courts of eminent respectability were holding that no action could be maintained against the director-general, and that the actions that were brought should be brought against the railroad companies.

The decision in the *Ault Case* disposes of the case against the company. The judgment against it must be reversed and the cause of action against it must be dismissed. This leaves for consideration, then, the question as to whether the government can be substituted here, and, if not, then the question arises as to the order that shall be made requiring it to expressly appear in the action.

We insist, in the first place, that although the government was not expressly named as defendant, through the company, it appeared in the case, and is bound by the judgment rendered therein. (23 Cyc. 1245; 15 R. C. L. 1009; *Ludy v. Larsen*, 78 N. J. Eq. 237, 37 L. R. A. (n. s.) 957, 79 Atl. 687; Bigelow on Estoppel, 113, 114; 2 Van Fleet on Former

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Adjudications, sec. 525; *Stoddard v. Thompson*, 31 Iowa, 80; Herman on Estoppel & Res Judicata, sec. 156.)

Assuming that the government has not been prejudiced, should the substitution order be refused on account of anything that transpired during the trial? If the proceedings that took place were of such a character that all of its rights were conserved as if it were expressly by pleadings a litigant in the case, is not the court authorized to make the order of substitution prayed for? If, however, this order is not made, then is not the court authorized in reversing the judgment against the railway company and ordering a dismissal of the action against it, to order that respondent can amend her complaint so as to name the government or its agent a defendant in the action? The answers to these questions depend on what can be accomplished through the power of amendment to be exercised by the court.

The disposition of courts is toward liberality in the allowance of amendments at all stages of the proceedings. An amendment was allowed after *remittitur* in the supreme court where the original injury complained of was adhered to. (*Flaherty v. Butte Electric Ry. Co.*, 43 Mont. 141, 115 Pac. 40.) The court will sanction the allowance of amendments with great liberality where the nature of the cause of action is not changed, even after entry of judgment. (*Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327.) That these amendments, when allowable at all, may be allowed by appellate courts, see L. R. A. (n. s.) 1916D, 841. The case of *Boehmke v. Northern Ohio Traction Co.*, 88 Ohio St. 156, 102 N. E. 700, bears a striking resemblance to the instant one; there it was held that substitution of a defendant may be made for one sued as defendant by mistake. (See, also, *Adams v. Weeks*, 174 Mass. 45, 54 N. E. 350; *Bainum v. American Bridge Co. of N. Y.*, 141 Fed. 179; *McCord-Collins Co. v. Prichard*, 37 Tex. Civ. 418, 84 S. W. 388; *Wright v. Eureka Tempered Copper Co.*, 206 Pa. St. 274, 55 Atl. 978.)

Where a damage suit was instituted jointly against two railroad companies two years from the accident, and a judgment in favor of the plaintiff was reversed because of misjoinder of defendants, an amendment of the petition in the original action by leaving out the defendant wrongfully joined and otherwise setting forth the same cause of action did not set up a new cause of action, so as to be barred by limitations, although more than two years had expired when the amendment was made. (*Texas-Midland R. R. v. Cardwell* (Tex. Civ.), 67 S. W. 157.) Of like tenor and of like effect are the following cases: *Cox v. San Joaquin L. & P. Co.*, 33 Cal. App. 522, 166 Pac. 578; *Ruiz v. Santa Barbara G. & E. Co.*, 164 Cal. 188, 128 Pac. 330; *Reardon v. Balaklala Cons. Copper Co.*, 193 Fed. 189; *Philadelphia B. & W. R. Co. v. Gatta*, 4 Boyce (Del.), 38, Ann. Cas. 1916E, 1227, 47 L. R. A. (n. s.) 932, 85 Atl. 721; *Hagenauer v. Detroit Copper Min. Co.*, 14 Ariz. 74, Ann. Cas. 1914C, 1016, 124 Pac. 803; *Boudreaux v. Tucson Gas, E. L. & P. Co.*, 13 Ariz. 361, 33 L. R. A. (n. s.) 196, 114 Pac. 547; *Motsenbocker v. Shawnee G. & E. Co.*, 49 Okl. 304, L. R. A. 1916B, 910, 152 Pac. 82. The supreme court of the United States has repeatedly discussed the questions we are now considering, especially in cases that have arisen under the federal liability law, holding that amendments of the character involved can be made after the statute of limitations has run. (*Missouri K. & T. R. Co. v. Wulf*, 226 U. S. 570, Ann. Cas. 1914B, 134, 57 L. Ed. 355, 33 Sup. Ct. Rep. 135; *Fidelity Title & Trust Co. v. Dubois Electric Co.*, 253 U. S. 212, 64 L. Ed. 865, 40 Sup. Ct. Rep. 514; *Kansas City Western Ry. Co. v. McAdow*, 240 U. S. 51, 60 L. Ed. 520, 36 Sup. Ct. Rep. 252; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. Ed. 1226, 34 Sup. Ct. Rep. 729; *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, 60 L. Ed. 1006, 36 Sup. Ct. Rep. 567 [see, also, Rose's U. S. Notes].) Statutes of limitations do not apply to amendments to a complaint or declaration unless such amendments introduce new causes of action. (*Texas & Pac. Ry. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829,

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12 Sup. Ct. Rep. 905 [see, also, Rose's U. S. Notes]; *Helm v. Hines* (Kan.), 198 Pac. 190.)

Decisions of the courts relating to substitution of director-general for railway company: *Anderson v. Minneapolis St. P. etc. R. Co.*, 146 Minn. 430, 179 N. W. 45; *Hines v. Parry* (Tex. Civ.), 227 S. W. 339; *Helm v. Hines* (Kan.), 198 Pac. 190; *Peacock v. Detroit G. H. & M. R. Co.*, 208 Mich. 403, 8 A. L. R. 964, 175 N. W. 580; *Atchison T. & S. F. Ry. Co. v. Francis* (Tex. Civ.), 227 S. W. 342; *Robinson v. Central of Georgia Ry. Co.*, 150 Ga. 41, 102 S. E. 532; *Westbrook v. Director General of Railroads*, 263 Fed. 211; *Gundlach v. Chicago & N. W. R. Co.*, 172 Wis. 438, 179 N. W. 577, 985; *Payne v. Hayes*, 25 Ga. App. 730, 104 S. E. 917; *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21; *Atchison, T. & S. F. Ry. Co. v. Francis* (Tex. Civ.), 227 S. W. 342; *Panhandle & S. F. Ry. Co. v. Haywood* (Tex. Civ.), 227 S. W. 347.

In *Gundlach v. Chicago & N. W. Ry. Co.*, 172 Wis. 438, 179 N. W. 577, 985, a motion to substitute the agent named by the President under the terms of the Transportation Act was granted by the Wisconsin supreme court in a case where recovery was had in the lower court against the railway company. (See, also, *Goldstein v. Hines*, 183 N. Y. Supp. 518; *Payne v. Hayes*, 25 Ga. App. 730, 104 S. E. 917; *Panhandle & S. F. Ry. Co. v. Haywood* (Tex. Civ.), 227 S. W. 347; *Atchison, T. & S. F. Ry. Co. v. Francis* (Tex. Civ.), 227 S. W. 342; *Hines v. Collins* (Tex. Civ.), 227 S. W. 332.)

Mr. A. A. McLaughlin, General Solicitor, United States Railroad Administration, submitted a brief, in opposition to motion to substitute the Director-general of Railroads for defendant railway company; *Mr. T. B. Weir*, of Counsel, making oral argument.

MR. JUSTICE GALEN delivered the opinion of the court.

This is an appeal from the judgment and order denying defendant's motion for a new trial. Upon verdict of a jury,

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judgment for \$25,000 damages was rendered and entered by the district court of Flathead county against the defendant railway company, in an action brought by plaintiff for the benefit of the heirs of John A. Bryson, deceased, a locomotive engineer killed in the course of his employment, February 3, 1918, by reason of a collision, through alleged negligence on defendant's part while engaged in operating its railroad in interstate commerce. At the time the accident occurred, defendant's railroad was in the possession and under the control of the United States, under and by virtue of proclamation of the President, effective December 31, 1917 (40 Stat. 1733), pursuant to war powers vested in him as commander in chief of the army (sec. 2, Art. II, Const.) by Act of Congress of August 29, 1916 (39 Stat. 619, 645; U. S. Comp. Stats., sec. 1974a; 9 Fed. Stats. Ann., 2d ed., p. 1095), later ratified by the Federal Control Act of March 21, 1918 (40 Stat. 451; U. S. Comp. Stats. 1918, U. S. Comp. Stats. Ann. Supp. 1919, secs. 3115³/₄a-3115³/₄p; Fed. Stats. Ann. 1918, p. 757), all of which was by the defendant railway company urged in defense.

The action was brought by plaintiff by complaint filed April 10, 1918, on the theory that liability was created by the Employers' Liability Law (35 Stat. 65; U. S. Comp. Stats., secs. 8657-8665; 8 Fed. Stats. Ann., 2d. ed., pp. 1208, 1339), rather than the federal control Act; it being argued that no new liability was created, that suits were not abated because of federal possession, and that the carrier might be sued as before.

The case was tried July 2, 1918, and judgment was entered [1] August 28, 1918. By demurrer and answer filed, and throughout the trial, the defendant contended that, since the United States was in control of and operating its railroad, no responsibility rested upon it for the negligent death complained of, and that the director-general of railroads, appointed by the President of the United States, rather than it, was the proper party defendant. The trial court took a

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contrary view, and in consequence verdict and judgment was, as stated, rendered against the defendant railway company. It is now conceded by the plaintiff that the trial court was in error, and that the proper party defendant was the director-general of railroads, rather than the Great Northern Railway Company, and by motion filed the plaintiff now seeks on this appeal to have this court order a substitution of the agent designated by the President under the Transportation Act of 1920 (41 Stat. 456) in lieu of the defendant, Great Northern Railway Company. Furthermore, the defendant has filed with this court a motion for judgment because of improper party defendant, and James C. Davis, agent for the government, has appeared and made objection to the jurisdiction of this court to grant an order substituting parties defendant.

It is conceded by plaintiff's counsel that the cause must be [2] reversed as to the defendant company, and the only question presented necessary for our decision is whether it is within the jurisdiction of this court to order a substitution of the party defendant, so as to make the judgment entered herein effectual against James C. Davis, as agent, under the Transportation Act, rather than the defendant railway company, or to grant a new trial permitting such substitution of the party defendant, and a retrial of the issues as to the new party defendant.

By the Act of Congress of August 29, 1916, it is provided: "The President, in time of war, is empowered, through the secretary of war, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Pursuant to this enactment the President issued his proclamation of December 26, 1917, reading in part as follows:

"It is hereby directed that the possession, control, operation and utilization of such transportation systems hereby by me undertaken shall be exercised by and through William G. McAdoo, who is hereby appointed and designated director-general of railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies."

And section 10 of the Act of March 21, 1918, designated as the Federal Control Act, wherein the action of the Chief Executive in taking over the possession and control of the operation of the railroads in the United States was ratified and approved, reads in part as follows: "That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agent of the federal government. Nor shall any such carrier be entitled to have transferred to a federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the federal control of such carrier; and any action which has heretofore been so transferred because of such federal control or of any Act of Congress or official order or proclamation relating thereto

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shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such federal control."

It seems clear from these statutes and the proclamation of the President that the defendant corporation cannot be held liable for the wrongful death of which complaint is made. Although the Federal Control Act was not passed until after the accident in question, yet it was effective and made plain the government's independent liability at the time this action was commenced. Until its enactment, the government had not given its consent to be sued, but that made no difference as respects the question of primary liability for the death made the basis of the action. Even though the government could not be sued, it would be manifestly unjust to hold the defendant corporation responsible for the government's negligent operation of the railroad, simply because the government could not be reached.

Aside from the Federal Control Act, the government was in fact in possession of and conducting defendant's railroad by virtue of the assertion of its sovereign power. Defendant was ousted, and had nothing to do with train operations on its line at the time of the accident, and it would be absurd to hold the defendant corporation accountable for negligent train operations by the government. True it is that the procedural remedy was not clear, and there was diversity of opinion expressed by the courts as to accountability for such torts after the President's proclamation; however, after the promulgation by the director-general of railroads of General Order No. 50, issued October 28, 1918, the subject was made clear and set at rest. That order reads in part as follows: "Whereas, since the director-general assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during federal control for which said carrier corporations are not responsible.

and it is right and proper that the action, suits and proceedings hereinafter referred to based on causes of action arising during or out of federal control should be brought directly against the said director-general of railroads and not against said corporation: It is therefore ordered that actions at law, suits in equity and proceedings in admiralty hereafter brought in any court based on contract, binding upon the director-general of railroads, claims for death or injury to person, or for loss and damage to property arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the director-general of railroads, which action, suit or proceeding but for federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, director-general of railroads, and not otherwise: Provided, however, that this order shall not apply to actions, suits or proceedings for the recovery of fines, penalties and forfeitures. * * * The pleadings in all such actions at law, suits in equity, or proceedings in admiralty, now pending against any carrier company for a cause of action arising since December 31, 1917, based upon a cause of action arising from or out of the operation of any railroad or other carrier, may on application be amended by substituting the director-general of railroads for the carrier company as party defendant and dismissing the company therefrom."

This order made plain the fact that the government and not the defendant corporation was operating the defendant's railroad, and that the government rather than the defendant is accountable for the negligence alleged, resulting in the death of plaintiff's intestate. In the case of *Northern P. Ry. Co. v. North Dakota*, 250 U. S. 135, 63 L. Ed. 897, 39 Sup. Ct. Rep. 502, involving the state's right to fix rates on intrastate business, Mr. Chief Justice White, speaking for the court, said: "No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with

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the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the Act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it. Conclusive as are these inferences, they are superfluous, since the portion of section 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates."

In view of this decision there can be no doubt as to the extent of the power conferred upon the President by Congress. (*Hatcher & Snyder v. Atchison, T. & S. F. Ry. Co.* (D. C.), 258 F. 1. 952.) In the case of *Missouri Pacific R. Co. v. Ault*, 256 U. S. 554, 65 L. Ed. 647, 41 Sup. Ct. Rep. 593, a somewhat similar situation to that under consideration arose; the action being for wages due July 29, 1918, the date Ault was discharged as an employee of the carrier. Therein it was by the court said: "The company is clearly not answerable in the present action if the ordinary principles of common-law liability are to be applied. The railroad administration established by the President in December, 1917, did not exercise its control through supervision of the owner companies, but

by means of a director-general through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace, for the period provided, the private ownership theretofore existing.' (*Northern Pac. R. Co. v. North Dakota*, 250 U. S. 135, 148, 63 L. Ed. 897, 902, P. U. R. 1919D, 705, 39 Sup. Ct. Rep. 502.) This authority was confirmed by the Federal Control Act of March 21, 1918, Chapter 25, 40 Stat. 451, and the ensuing proclamation of March 29, 1918, 40 Stat. 1763. By the establishment of the railroad administration and subsequent orders to the director-general, the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.' (U. S. R. R. Adm. Bulletin No. 4, pp. 113, 114, 313.) The railway employees were under its direction, and were in no way controlled by their former employers. (See Bulletin No. 4, p. 168, sec. 5, 198 *et seq.*, 330 *et seq.*) It is obvious, therefore, that no liability arising out of the operation of these systems was imposed by the common law upon the owner companies, as their interest in and control over the systems were completely suspended. * * * It is urged that, since section 10, in terms, continues the liability of 'carriers while under federal control,' and permits suit against them, it should be construed as subjecting the companies to liability for acts or omissions of the railroad administration, although they are deprived of all the power over the properties and the personnel. * * * Such a radical departure from the established concepts of legal liability would at least approach the verge of constitutional power. It should not be made in the absence of compelling language. (*United States ex rel. Atty. Gen. v. Delaware & H. Co.*, 213 U. S. 366, 408, 53 L. Ed. 836, 848, 29 Sup. Ct. Rep. 527.) There is not such here. * * * The government was to operate the carriers, but the usual im-

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munity of the sovereign from legal liability was not to protect the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analogous to that which would exist if there were a general receivership of each transportation system. * * * If the cause of action arose while the government was operating the system, the 'carrier while under federal control' was, nevertheless, to be liable and suable. This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts. (See *Gracie v. Palmer*, 8 Wheat. 605, 632, 633, 5 L. Ed. 696, 703 [see, also, Rose's U. S. Notes].) The title by which suit should be brought—the person who should be named as defendant—was not designated in the Act. * * * All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it be against the director-general by name. As the Federal Control Act did not impose any liability upon the companies on any cause of action arising out of the operation of their systems of transportation by the government, the provision in Order No. 50, authorizing the substitution of the director-general as defendant in suits then pending, was within his power, the application of the Missouri Pacific Railroad Company that it be dismissed from this action should have been granted, and the judgment against it should therefore be reversed." (See, also, *Western Union Tel. Co. v. Poston*, 256 U. S. 662, 65 L. Ed. 709, 41 Sup. Ct. Rep. 598.)

These decisions are conclusive; but, aside from them, to us it appears elementary that it is not within the province or jurisdiction of this court to grant a new trial merely because it appears that judgment has been had against the wrong party. More especially so when, as in this case, the defendant used its utmost endeavors in the trial court to have the proper party defendant substituted for it. We cannot at this juncture of the proceedings say this is a meritorious case; the judgment is warranted, but you have sued and obtained a judgment against a party not legally responsible; therefore

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the cause is reversed and remanded, with directions to substitute a new party defendant, and proceed to a trial *de novo* as against such new party. Such procedure is unheard of and unjustifiable, and we venture to say that, if the case were one between individual litigants, plaintiff's learned counsel would not be heard to seriously advance such a proposition.

Neither are we authorized, nor is it within our jurisdiction, to substitute a new party defendant and affirm the judgment as to such substituted party. The plaintiff deliberately elected to sue the corporation, as the party primarily responsible, and rejected the efforts made by the defendant to have the director-general of railroads substituted, and insisted that the defendant corporation alone was the party responsible. The defendant company seasonably asserted and persisted in maintaining its nonliability, since the government was in possession, control, and operation of its railroad at the time of the negligent death of the plaintiff's intestate. Were we to order a substitution of parties defendant at this time, and affirm the judgment as against the new defendant, we feel that our action would be arbitrary and wholly unwarranted. The judgment must stand or fall on its merits as against the party as to whom it has been rendered, and new parties cannot thus be brought in and substituted arbitrarily without process or hearing, and made to respond in damages without being given their day in court. Indeed, learned counsel for the plaintiff, while insisting upon a reversal of the judgment as to the defendant corporation, frankly admitted on the argument in this court "that if the government is now in this case for the first time, no order of substitution can be made."

The judgment and order appealed from are reversed and the cause is remanded, with directions to dismiss plaintiff's complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

Rehearing denied December 28, 1921.

RAY, RESPONDENT, v. GALLATIN VALLEY RY. CO.,
APPELLANT.

(No. 4,503.)

(Submitted November 1, 1921. Decided November 23, 1921.)

[203 Pac. 533.]

(For syllabus, see *Bryson v. Great Northern Ry. Co.*, ante,
p. 351.)*Appeals from District Court, Gallatin County; B. B. Law,
Judge.*

ACTION by Jess S. Ray against the Gallatin Valley Railway Company. Judgment for plaintiff, and defendant appeals from it and from an order overruling its motion for a new trial. Reversed and remanded, with directions to dismiss the complaint.

Mr. Charles J. Marshall and *Messrs. Keister & Bath*, for Appellant, submitted a brief; *Mr. A. N. Whitlock*, of Counsel, argued the cause orally.

The court erred in refusing to substitute the director-general of railroads and to dismiss as to this defendant. (*Rutherford v. Union Pacific R. Co.*, 254 Fed. 880; *Sagona v. Pullman Co.*, 174 N. Y. Supp. 536; *Haubert v. Baltimore etc. R. Co.*, 259 Fed. 361; *Mardis v. Hines*, 6 Fed. 945.) The following cases also hold that the corporation cannot be held liable for the torts committed by the director-general or his employees; (*Schumacher v. Pennsylvania R. R. Co.*, 106 Misc. Rep. 564, 175 N. Y. Supp. 84; *Southern Cotton Oil Co. v. Atlantic etc. R. Co.*, 257 Fed. 138; *Dahn v. McAdoo*, 256 Fed. 549.)

Messrs. Carlson & Peterson, for Respondent, submitted a brief; *Mr. C. E. Carlson* argued the cause orally.

The court did not err in refusing to substitute the director-general. (*McGregor v. Great Northern Ry. Co.* (N. D.), 172

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N. W. 841, 4 A. L. R. 1635; *Postal Telegraph-Cable Co. v. Call*, 255 Fed. 850, 167 C. C. A. 178; *Jensen v. Lehigh Valley R. Co.*, 255 Fed. 795; *Lavalle v. Northern Pac. Ry. Co.*, 143 Minn. 74, 4 A. L. R. 1659, 172 N. W. 918; *Missouri Pac. R. Co. v. Ault*, 140 Ark. 572, 216 S. W. 3; *Johnson v. McAdoo*, 257 Fed. 757; *Vaughn v. State*, 17 Ala. App. 35, 81 South. 417; *Scarborough v. Louisiana Ry. & N. Co.*, 145 La. 323, 82 South. 286.)

MR. JUSTICE GALEN delivered the opinion of the court.

In this action plaintiff sought to recover \$20,000 for personal injuries alleged to have been sustained by him on March 2, 1918, at Three Forks, Montana, in consequence of the careless and negligent acts of the defendant corporation in permitting an engine and cars to be suddenly backed into a passenger-coach in which the plaintiff was seated as a passenger.

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, which was overruled, and it then filed a motion to substitute as defendant in the action Wm. G. McAdoo, director-general of railroads, in its place, which motion was denied. Thereafter the defendant made and filed its answer, wherein it is alleged in defense as follows: "That continuously since the thirty-first day of December, A. D. 1917, all the property of every kind and character of the above-named defendant has been under the exclusive management and control and has been in the possession of and operated by the United States railroad administration, under the director-general of railroads, and this defendant company has not at any time since December, 1917, been operating its road or in possession thereof, and that neither it, nor its employees, nor any person for whom this defendant company can be held responsible, committed any of the acts complained of in plaintiff's complaint."

A motion for a nonsuit on grounds that the evidence is insufficient was by the court denied. The same matter of defense was preserved by instructions to the jury, offered by

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the defendant and refused by the court. The case was tried to a jury in the district court of Gallatin county, and resulted in a verdict in plaintiff's favor for the sum of \$3,000, for which amount judgment was rendered and entered. The appeal is from the judgment and order overruling defendant's motion for a new trial.

The only question necessary for decision is whether it is within the jurisdiction of this court to order a substitution of parties defendant, so as to make the judgment effectual against the government agent appointed under the Transportation Act of 1920, or to grant a new trial, permitting such substitution of parties defendant, and a trial *de novo* on the issues. This same question was presented and this day decided by this court in the case of *Bryson v. Great Northern Ry. Co.*, ante, p. 351, 203 Pac. 529. Upon the authority of the decision in that case, and for the reasons therein stated, it is hereby ordered that this cause be and it is hereby reversed and remanded. with directions to dismiss plaintiff's complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

**MISSOULA TRUST & SAVINGS BANK, APPELLANT, v.
NORTHWESTERN ABSTRACT & TITLE INSUR-
ANCE CO. ET AL., RESPONDENTS; FRIDAY, INTERVENER
and RESPONDENT.**

(No. 4,560.)

(Submitted October 26, 1921. Decided November 23, 1921.)

[203 Pac. 854.]

***Execution — Proceedings Supplementary — Affidavit — Insuffi-
ciency.***

**Execution—Proceedings Supplementary—Question of Title to Property not
Triable.**

1. Contested claims as to title to property sought to be subjected to execution cannot be litigated in supplementary proceedings.

Same—Affidavit—Contents.

2. Supplementary proceedings are provided to aid the judgment creditor in reaching property of the judgment debtor which cannot otherwise be reached by the judgment; hence before they can be resorted to, the creditor must by affidavit make it appear that he has a valid and subsisting judgment against the debtor which has been unpaid, in whole or in part, and that execution issued has been returned unsatisfied in whole or in part.

Same—Affidavit—Insufficiency.

3. An affidavit on which relief by supplementary proceedings was asked, setting forth no more than the entry of judgment and issuance of execution thereon, thus failing to disclose that the judgment was then unpaid, in whole or in part, or that it had been returned unsatisfied or could not be satisfied out of property other than that claimed by an intervener, an order refusing to permit the creditor to bring an action against the latter under section 6854, Revised Codes, was correct.

***Appeals from District Court, Missoula County; Theodore
Lentz, Judge.***

ACTION by the Missoula Trust & Savings Bank against the Northwestern Abstract & Title Insurance Company; R. C. W. Friday, Intervener. From orders denying plaintiff the right to institute an action against intervener for recovery of attached property, it appeals. Affirmed.

1. Supplementary proceedings, see note in 100 Am. Dec. 500.

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Mr. Elmer E. Hershey, for Appellant, submitted a brief and argued the cause orally.

Mr. R. C. W. Friday, *pro se*, submitted a brief and argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

This action was commenced to recover judgment against defendant upon a promissory note. In the proceeding a writ of attachment was issued and notice of attachment served upon intervener, R. C. W. Friday. In response to the demand of the sheriff, Friday made a statement to the effect that he held the abstract plant of defendant and claimed a lien thereon by reason of expert services rendered upon it. Thereafter, with permission of the court, Friday filed a complaint in intervention setting forth his claim of lien and asking for a decree of foreclosure. The complaint in intervention was served upon the attorney for plaintiff but no service was made personally upon defendant. An acknowledgment of service by William Wayne, as attorney for defendant, was filed, although no general appearance was made in the action. About six months later, no answer to the complaint in intervention having been filed by either the plaintiff or defendant, Friday caused to be entered their default and decree of foreclosure of his lien. Order of sale was made under which the sheriff sold the abstract plant to Friday. Thereupon motion was made by plaintiff to have the decree of foreclosure set aside, which was overruled. The case proceeded against defendant to judgment upon which execution was issued. By virtue of this execution the sheriff tendered to Friday the amount due for his lien as set forth in his complaint in intervention and demanded the possession of the plant upon the execution, which tender and demand were refused. Plaintiff then cited Friday into court by virtue of the statutes providing for proceedings supplementary to execution. (Rev. Codes 1907, secs. 6851-6854, incl.)

Friday made answer to the citation, claiming ownership of the abstract plant by reason of the sale hereinbefore set forth. Plaintiff then made a motion that an order be entered in the matter authorizing it to institute an action against Friday under the provisions of section 6854 of the Revised Codes, for the recovery of the attached property. Two different orders were entered denying this motion. Plaintiff has appealed from these orders.

It is not for this court to consider the merits of the regularity of the proceedings leading up to the decree of foreclosure [1] and the sale based thereon. Contested claims as to title to property which plaintiff seeks to have subjected to its execution cannot be litigated in these supplementary proceedings. (*Johnson v. Lundeen, ante*, p. 145, 200 Pac. 451.) The only question for us to determine is whether or not, upon the showing made, the court should have entered the order authorizing plaintiff to institute the action against Friday as prayed for.

The supplementary proceedings provided for in the statutes [2] in aid of execution take the place of the common-law remedy known as bill in aid of execution or creditor's bill and must be interpreted in the light of the objects for which the statutes were passed. It clearly was not the object of the creditor's bill to permit the plaintiff to indulge in needless embarrassment to possible debtors of the judgment debtor or to give to the plaintiff a remedy which he did not need. It was intended merely to aid the judgment creditor in reaching property of the judgment debtor which cannot be reached by the judgment unaided. Such must be the interpretation of the statutes in question, and, therefore, before one can avail himself of the privilege of compelling an alleged debtor of the judgment debtor to come into court and make a disclosure of the relations existing between him and the judgment debtor as to property rights, it must appear that plaintiff has a valid and subsisting judgment against the judgment debtor which has been unpaid in whole or in part, and that execution has been issued and returned unsatisfied in whole or in part, thereby indicating that

the same cannot be satisfied out of other property. (17 Cyc. 1407, 1409; *Barber v. Briscoe*, 9 Mont. 341, 23 Pac. 726; *In re Downey*, 31 Mont. 441, 78 Pac. 772.) The affidavit in this case [3] upon which the relief prayed for is sought fails to show anything more than the entry of the judgment and the issuance of an execution thereon, and does not disclose whether or not such judgment was at the time of the making of the affidavit a valid and subsisting judgment unpaid in whole or in part, nor does it show the return of execution unsatisfied in whole or in part, nor by any other means that the judgment cannot be satisfied out of other property than the abstract plant in question. Under these circumstances the trial court was correct in refusing to enter an order authorizing plaintiff to bring action against Friday.

The orders appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

Rehearing denied December 24, 1921.

STATE, RESPONDENT, v. HARRINGTON, APPELLANT.

(No. 4,876.)

(Submitted October 27, 1921. Decided November 23, 1921.)

[202 Pac. 577.]

Criminal Law—Intoxicating Liquors—Instructions—Commenting on Evidence.

1. In a prosecution for selling intoxicating liquor, an instruction charging the jury that defendant was on trial for selling a bottle of whiskey "when the witnesses R. and V. [the state's principal witnesses] were present" at defendant's place of business, *held* prejudicially erroneous as commenting upon the evidence and invading the province of the jury, the fact of their presence having been disputed by defendant, thus presenting a question for the jury's determination.

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Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

WILLIAM F. HARRINGTON was convicted of violation of the liquor laws and appeals from the judgment. Reversed and remanded.

Mr. E. E. Enterline and Mr. H. C. Crippen, for Appellant, submitted a brief and argued the cause orally.

Mr. Wellington D. Rankin, Attorney General, and *Mr. A. L. Foot*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Foot* argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

The defendant was convicted in the district court of Yellowstone county of selling intoxicating liquors in violation of the provisions of Chapter 175 of the Laws of 1917. From the judgment he appeals.

The principal evidence upon the part of the state given by two witnesses, Ryan and Van Wert, was that, together, they went into the defendant's place of business at 1 o'clock on the afternoon of August 13, 1920, and bought two drinks, and by arrangement with the defendant both returned at 8 o'clock in the evening of that day and purchased from him a pint bottle of whiskey. The defendant was a witness in his own behalf and denied both purchases, testifying that he had never seen either Ryan or Van Wert to know them until they were pointed out to him in the courtroom on the day of the trial.

Of the three assignments of error, we need only notice the [1] one presented by the defendant's objection to instruction No. 13, given by the court. He argues that its language assumes that the witnesses Ryan and Van Wert were both at defendant's place of business at the time they fix in their testimony. It reads:

"You are further instructed that the defendant is on trial for selling and disposing of intoxicating liquors alleged to have

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been committed on the thirteenth day of August, 1920; that the state has elected to stand upon the evidence of the sale by the defendant of one pint of whiskey about 8 o'clock of the evening of that day, when the witnesses Ryan and Van Wert were present.

“Evidence has been offered and received tending to show other sales of liquor by the defendant on the same day, but you are instructed that such evidence of other sales than the pint of whiskey above mentioned is admitted and received in evidence in this case only for the purpose of showing the intent, guilty knowledge, or motive, in corroboration of the testimony as to the offense charged, to prove the identity of the perpetrator of the crime or to show that the act complained of was a part of a chain or system of crimes, and you are to consider it for no other purpose. But if you believe from the evidence that the defendant sold the pint bottle of whiskey to the witnesses on the evening of the thirteenth day of August, then you should find the defendant guilty of the crime of selling and disposing of intoxicating liquors as alleged in the information.”

The attorney general in his brief insists that by the use of the words “when Ryan and Van Wert were present,” as they are there employed, the court intended merely to direct the minds of the jury to the sale upon which the state relied for conviction, and that the charge of the court, as a whole, should be given a reasonable and not a strained construction. This is undoubtedly correct in principle. But the court did more than that. It relieved the jury of the necessity of weighing the conflicting evidence touching the presence of Ryan and Van Wert at the defendant's place of business on the occasion relied on by the state. Translated, it tells the jury that at 8 o'clock in the evening of August 13, 1920, Ryan and Van Wert were present in the defendant's place of business because they so testified, and that the state had elected to stand for conviction upon their evidence of a sale, regardless of the testimony of the defendant denying a sale; that they were never in his place of business to his knowledge, and that he had never seen them before the day of the trial, to his recollection. Had the court,

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in appropriate words, left that issue for determination by the jury upon this conflicting testimony, we should now be foreclosed by its finding of guilt as charged. The verdict of guilty, however, makes it possible to infer that the jury understood the instruction as we now do, namely, that the testimony given by the two witnesses mentioned was conclusive upon the question of their presence at the defendant's place of business, as they state. A little thought will prove the error to be more damaging to the defendant than at first appears. In the ordinary course of its deliberations, taking the incidents of the transaction in their natural sequence, the first question to be determined by the jury was this: Were Ryan and Van Wert present in person at the defendant's place of business at the time fixed by them? In giving instruction No. 13, so worded, the court itself determined a matter the jury may have considered the turning point in the case, namely, that the two witnesses were in defendant's place of business at 8 o'clock that evening, and thus led them to a conclusion upon the next question for their determination—the sale of the pint of whiskey as they relate it. In this view, the instruction can be construed as meaning nothing less than that Ryan and Van Wert were in defendant's place of business at 8 o'clock on the evening of August 13, 1920, and this may have gone a long way toward inducing the belief that they bought whiskey also. This was a comment upon the evidence, and an invasion of the province of the jury in its endeavor to ascertain the facts. That a court may not do this without depriving the accused of his absolute right to have the question of his guilt or innocence, not only of the particular crime charged, but every material incident included in it, passed upon by the jury, is settled by the decision of this court in *State v. Koch*, 33 Mont. 490, 8 Ann. Cas. 804, 85 Pac. 272, and kindred cases.

For these reasons the judgment appealed from is reversed and a new trial ordered.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

WEGGE, RESPONDENT, v. GREAT NORTHERN RAILWAY
CO. ET AL., APPELLANTS.

(No. 4,480.)

(Submitted September 23, 1921. Decided November 28, 1921.)

[203 Pac. 360.]

Personal Injuries—Master and Servant—Railroads—Scope of Employment—Conflict in Evidence—Excessive Verdicts—New Trial.

Master and Servant—Railroads—Injuries in Course of Employment—Conflicting Evidence—Verdict Conclusive.

1. The question whether, when plaintiff, a section-hand, was injured by a collision while resting in a caboose standing upon the main line after the dinner hour and waiting to be transported to work, he was or was not acting within the scope of his employment was for the jury's determination where the evidence relating thereto was not conclusive either way.

Same—Scope of Employment—Conductor Acting as Engineer—Liability of Master.

2. *Held*, that a conductor of a work train was not only acting in furtherance of the operations entrusted to him, but also within the scope of his authority when, in the temporary absence of the engineer, he assumed charge of the locomotive and in his endeavor to switch a caboose from the main line, where it was a menace to life and limb on account of passing trains, to a side-track and in doing so caused a collision with the caboose injuring plaintiff.

Witness—Credibility.

3. The evidence of a witness, to be credible, must be within reason.

Personal Injuries—Excessive Verdict—New Trial.

4. Plaintiff, a section-hand, at the time of the accident was fifty-six years of age, earning twenty-two and one-half cents per hour. His own physician declined to state that he was permanently injured; when he left the hospital there were no visible signs of injury upon his body; X-ray plates made of the injured parts showed no permanent injury. At the time of the trial he was able to conduct a substantial restaurant business. *Held*, that a verdict for \$10,000 was so excessive as to warrant the granting of a new trial.

Appeals from District Court, Hill County; W. B. Rhoades, Judge.

ACTION by Charles Wegge against the Great Northern Railway Company and another. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Reversed.

4. On excessiveness of damages in actions for personal injuries other than death, see notes in 16 Ann. Cas. 8; Ann. Cas. 1913A, 1361; Ann. Cas. 1915D, 488; Ann. Cas. 1916C, 916; L. R. A. 1915F, 30.

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Mr. I. Parker Veazey, Jr., Mr. W. L. Clift and Mr. R. H. Glover, for Appellant Railway Company, submitted a brief; *Mr. Veazey* argued the cause orally.

The verdict is so excessive as to entitle defendants to a new trial. If the verdict is merely scaled by the court, and the view is taken that defendants are not entitled to a new trial, as a matter of right, we urge that the verdict be radically scaled. (*Hall v. Northern Pac. Ry. Co.*, 56 Mont. 537, 186 Pac. 340; *Emerson v. Butte Electric Ry. Co.*, 46 Mont. 454, 129 Pac. 319; *Previsich v. Butte Electric Ry. Co.*, 47 Mont. 170, 131 Pac. 25; *Stewart v. Pittsburg etc. Co.*, 42 Mont. 200, 111 Pac. 723.)

The railway company is not liable because plaintiff was not engaged in the scope of his employment. (See *Moyse v. Northern Pac. Ry. Co.*, 41 Mont. 272, 108 Pac. 1062; *Glover v. Chicago M. & St. P. Ry. Co.*, 54 Mont. 446, 171 Pac. 278.)

Defendant company is not liable for tort of the coservant, because such coservant was not acting in scope of his employment. (5 Labatt on Master & Servant, sec. 1642; *Bequette v. St. Louis I. M. & S. Ry. Co.* (1900), 86 Mo. App. 601; *Biederman v. Brown*, 49 Ill. App. 483; *Beard v. London General Omnibus Co.*, 2 Q. B. (C. A.) 530; *Limpus v. London General Omnibus Co.*, 1 Hurl. & C. 526.)

Mr. A. F. Lamey, Mr. L. V. Beaulieu and Mr. H. S. McGinley, for Appellant Louis S. Mayer, submitted a brief.

Plaintiff was a trespasser. The only duty owed to a trespasser is to abstain from wantonly, recklessly and willfully injuring him. (*Ashworth v. Southern R. Co.*, 116 Ga. 635, 59 L. R. A. 592, 43 S. E. 36; *Blanchard v. Lake Shore etc. R. Co.*, 126 Ill. 416, 9 Am. St. Rep. 630, 18 N. E. 799; *Jordan v. Grand Rapids etc. R. Co.*, 162 Ind. 464, 102 Am. St. Rep. 217, 70 N. E. 524; *Trudell v. Grand Trunk R. Co.*, 126 Mich. 73, 53 L. R. A. 271, 85 N. W. 250; *Hern v. Southern Pacific Co.*, 29 Utah, 127, 81 Pac. 902.) The negligence must be so gross that

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the defendant would have been liable for exemplary damages had death ensued. (*Houston etc. R. Co. v. Boozer*, 2 Posey Unrep. Cas. (Tex.) 452.)

In the case of *Snyder v. Natchez etc. R. Co.*, 42 La. Ann. 302, 7 South. 582, it was held that where a person, although lawfully upon railroad premises, afterwards intrudes upon cars of the company on which he has no business, he becomes a trespasser; and especially is this the case where such intrusion is forbidden by the railroad company. (See, also, *Chenery v. Fitchburg R. Co.*, 160 Mass. 211, 22 L. R. A. 575, 35 N. E. 554; *Norfolk etc. R. Co. v. Stegall's Admx.*, 105 Va. 538, 54 S. E. 19; *Jordan v. Grand Rapids etc. R. Co.*, 162 Ind. 464, 102 Am. St. Rep. 217, 70 N. E. 524.) It is apparent from the testimony of the plaintiff and his witness that neither the defendant company nor the defendant Mayer knew of the presence of plaintiff in the caboose until after the collision.

Mr. Victor R. Griggs, for Respondent, submitted a brief and argued the cause orally.

Nowhere in their brief have appellants attempted to show wherein there was evidenced any passion or prejudice on the part of the jury in arriving at their verdict and this court has said: "The elements of passion and prejudice will not be presumed to have influenced the minds of the jurors to return a verdict based on competent testimony in accordance with instructions and easily to be arrived at by mathematical calculation." (*Yergy v. Helena Light & Ry. Co.*, 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310.)

It has been repeatedly held by this court that the mere fact that the verdict in the opinion of the court is excessive, or that the verdict appears on its face excessive, is not a sufficient ground for judicial interference unless it appears to have been the result of passion or prejudice on the part of the jury. (*Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. 448; *Sweeney v. City of Butte*, 15 Mont. 274, 39 Pac. 286; *Flaherty v. Butte Electric R. Co.*, 42 Mont. 89, 111 Pac. 348; *Lewis v. Northern Pac. Ry.*

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Co., 36 Mont. 207, 92 Pac. 469; *Yellowstone Park Ry. Co. v. Bridger Coal Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 9 Ann. Cas. 470, 87 Pac. 963; *Neary v. Northern Pac. Ry. Co.*, 41 Mont. 480, 110 Pac. 226; *Bourke v. Butte Elec. & Power Co.*, 33 Mont. 267, 83 Pac. 470; *Hollenbeck v. Stone & Webster Eng. Corp.*, 46 Mont. 559, 129 Pac. 1058; *Kelly v. John R. Daily Co.*, 56 Mont. 63, 181 Pac. 326.)

Where the verdict of the jury is based upon competent testimony and may be easily arrived at by mathematical calculation, it will not be disturbed. (*Yergy v. Helena Light & Ry. Co.*, 39 Mont. 213, 18 Ann. Cas. 1201, 102 Pac. 310; *Hollenbeck v. Stone & Webster Eng. Co.*, *Neary v. Northern Pac. Ry. Co.*, *Bourke v. Butte Elec. & Power Co.*, *supra.*)

Defendant Mayer was acting within scope of employment. His testimony shows that he was attempting to use the engine for the purpose of doing some switching and even though he had a mania for running the engine, and was not employed for that purpose, at the same time he was using it and running it in the furtherance of the business of the company. (*Purcell v. Southern Ry. Co.*, 119 N. C. 728, 26 S. E. 161; *Walker v. Gillette*, 59 Kan. 214, 52 Pac. 442; *Chicago etc. Ry. Co. v. Lundstrom*, 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. 198.)

The cases cited by appellant, Great Northern Railway Company, are not in point, inasmuch as they involve the negligent acts of ordinary employees and not the negligent acts of an official or vice-principal such as Mayer was.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was brought to recover damages for personal injuries the plaintiff received while resting in a caboose a mile west of Frazer station. The accident occurred between the hours of 12 and 1 o'clock, shortly before the time it was customary for the men to return to the caboose to be carried back to work. The plaintiff was a member of a crew unloading gravel brought in cars from a pit three miles west of the unloading point referred to in the evidence as the "industrial tracks" and forming part of the yards at Frazer. Cars fitted

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with bunks for sleeping quarters, and equipped for cooking meals for the men, called "outfit cars," were placed at a distance of about 400 feet from the junction of the "industrial tracks" with the main line. The caboose at the time the plaintiff was injured was standing on the main line distant from the "outfit cars" 600 or 800 feet, and east of the switch leading from the main track to the "industrial tracks" from 400 to 500 feet. About 11:30 on the morning of the accident, the conductor excused the plaintiff to permit him to get relief from a toothache which had been troubling him all the morning. He did not return to work during the forenoon. Soon after the arrival of the men at the "outfit cars" for dinner, the plaintiff left as he states, to be away from the noise—and went into the caboose, where he remained until injured, as he alleges. The crew whose business it was to load the gravel at the pit had gone to Glasgow, and no more unloading was to be done that afternoon.

The case was tried with the aid of a jury, and resulted in a verdict and judgment for the plaintiff. From an order denying a new trial and the judgment both defendants appeal.

Counsels' assignments of error present the following questions: (1) Was the plaintiff at the time he was injured, acting [1] within the course of his employment? (2) Was the conductor, in running the engine, acting within the scope of his authority? And (3) was the verdict excessive?

Upon neither one of the two first questions was the evidence so free of dispute that we may say the verdict of the jury is not conclusive upon the court. The first inquiry presents the question of the plaintiff's right to go into the caboose as he did. If he was there to serve his own comfort and convenience, and not to be ready to be transported back to work, he cannot recover, unless the injury was wantonly or intentionally inflicted upon him. Before we can resolve the question against the plaintiff, we must be able to say, as a matter of law, that the evidence shows him to have then been a mere stranger under license from the company, rather than an employee waiting to

be carried back to his work, or, upon the evidence that it was negligence for him to be in the caboose at that time. We cannot do either without announcing a rule as technical as it is artificial, unless his presence there constituted negligence, and in the face of a danger an ordinarily prudent man would have avoided. Upon the credibility of the witnesses and their faculty in depicting attending conditions, a correct solution of the question largely depends.

The plaintiff testified that it was customary for the men to ride in the caboose; that he was not told by the conductor that there would be no work that afternoon, and did not know that he was not required to report for duty; that he went into the caboose for the purpose of being transported to work after the dinner hour; that it was customary for the men to go to the vicinity of the caboose after dinner, for some to go inside and others to remain outside until the conductor signaled them to get aboard the caboose. On the other hand, the conductor testified that he told the plaintiff there would be no more work unloading that afternoon, and that he did not think they would need him.

Touching the right of the members of the crew to be in the caboose at that time, or at all, the conductor testified as follows: "None of the cable gang had authority to go into the caboose, or had permission to go into the caboose at any time. I don't believe I ever told them to get on the caboose at any time to ride to work even. I have always had trouble with them with reference to getting on the caboose. I always found them in the way in there when we wanted to do any work. We always had to wade through ten or twelve men in the caboose and I got real mad about it and told them I didn't like to see them all crowded around there in that way. I finally induced the majority of the men to keep out of the caboose. I had several of them with their minds made up not to get into that caboose at all."

If the plaintiff entered the caboose on other occasions as he did at this time, and, with other members of the crew, had

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been thus conveyed to the place his duty called him, with the knowledge of the conductor, he was injured while within the course of his employment. The jury seemed to have taken this evidence of the conductor to indicate impatience upon his part because so many men were in his way, and not as proof that plaintiff's presence in the caboose was contrary to any custom or rule forbidding it. Can it be that an implied contract ends suddenly and at a fixed moment, while the employee is still surrounded by the conditions and risks of his employment; or that it continues until the employee has ceased to be affected by them? To adopt the former and to reject the latter would rob the rule of its reason altogether.

The testimony for the plaintiff found more favor with the jury than did that produced against him and resulted in a verdict favorable to his contention. Having so determined on evidence that could not be construed conclusively either way, we cannot stamp the proposition as one of law instead of one of fact for the jury. The line of demarcation is not so well defined that the evidence upon the point is open to but one inference.. This phase of the present case so nearly resembles *Moyse v. Northern Pac. Ry. Co.*, 41 Mont. 272, 108 Pac. 1062, that the law therein declared is to be regarded as settled upon all kindred questions arising in this jurisdiction. After an exhaustive analysis of the doctrine announced in similar decisions, it is held that where the evidence presented is not conclusive either way, the question whether the employee was injured while doing something it was his duty to do, or he had a right to do under his contract of employment, was one of fact for the jury.

Passing to the next question: Was the conductor acting within [2] the scope of his authority when he ran the engine on this occasion? Stating the proposition more specifically, was that an act in furtherance of the operations intrusted to him by the defendant? He testified that, after dinner he, in company with the other members of the train crew, before returning to the gravel-pit, did some switching; that they went back to the

pit, the trip back and forth taking twenty-five or thirty-five minutes. After returning to the pit, "we grabbed hold of the caboose, threw it on to the main line, and shoved the empties back into the pit * * * nearest town, the one where the outfit cars were. We put the train away in there. Then we was going to go back to Frazer to the town. I got on the engine and Mr. Kettler got off to get a drink, and I took charge of the engine. I pulled out of the switch and started backing up and hit the caboose. I was backing in the direction of Frazer—east. * * * The caboose was set out on the main line because we had to get the caboose out of there in order to put the empties in; we always had the caboose with us out of town. We were not going to do any work after we put the train away on this spur-track. At Frazer we were going to have a holiday; we didn't have nothing to do. * * * It slipped my mind that the caboose was there at all."

Whatever may be said of the conductor's purpose in ordering the switching operations, it would have been negligence indefensible from any standpoint, to have left the caboose standing on the main line where it would be a menace to life and limb on account of passing trains. In switching the caboose from the main line, Mayer was acting in furtherance of the company's business. Whether he was acting within the scope of his authority when he mounted the engine and started it is a question somewhat more difficult to answer.

In Shearman & Redfield on Negligence, sixth edition, section 146, it is said: "The master is responsible for the negligent acts or omissions of his servants in the course of their employment, though unauthorized or even forbidden by him, and although outside of their 'line of duty,' and without regard to their motives, he cannot limit his responsibility for any servant by employing him only with reference to a single branch of the business. * * * There is no difference in this respect between a servant who is a general agent and one who is employed for a particular purpose; provided the latter is acting with the seeming consent of the master and within the apparent

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scope of his employment. Such a distinction has, however, been sometimes taken. The fact that the servant is employed only for a single purpose may be material in determining whether his negligence or other misconduct happens in the course of his employment; but if it does, the master's liability is exactly the same as if the servant were a general agent."

Long ago, the supreme court of the United States repudiated subtle refinements in fixing the moment when the relation of employee and employer begins and when it ends. (*Railway Co. v. Derby*, 14 How. 468, 14 L. Ed. 502 [see, also, Rose's U. S. Notes]; *Steamboat Co. v. Brockett*, 121 U. S. 637, 30 L. Ed. 1049, 7 Sup. Ct. Rep. 1039.) The distinctions involved in the term "scope of authority" are not to be drawn so fine that a particular act may be declared upon as a matter of law, unless the evidence is in such condition that reasonable men will not be likely to differ in its interpretation. If the act "be done in the course of his [the servant's] employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment. See Story on Agency, sec. 452; Smith on Master and Servant, 152." (*Railroad Co. v. Derby*, *supra*, and cases in 27 Am. St. Rep., note on page 226; *Lewis v. Mammoth Min. Co.*, 33 Utah, 273, 15 L. R. A. (n. s.) 439, 93 Pac. 732.) See, also, an elaborate and exhaustive opinion of the supreme court of Kansas, *Martin v. Atchison, T. & S. F. R. Co.*, 93 Kan. 681, 145 Pac. 849, in which the company is held liable for damages to a brakeman injured while firing the locomotive in obedience to the direction of the conductor. Also, *Rodman v. Michigan Cent. Ry. Co.*, 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788, where it was held that the conductor was acting rightfully in taking charge of the engine, but (by a divided court) that the suit failed because the plaintiff had assumed the risk of the injury.

The latter question is removed from the case at bar by the provisions of section 1 of Chapter 29 of the Laws of 1911,

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declaring the company liable to an employee for injury received by him through the negligence of any officer or other employee engaged in the operation of the railway, and section 3 of the same Act, abolishing the defense of assumed risk in any case where the dangerous condition out of which the injury grew has arisen from the negligence of the employer. The applicability of the statute to the case at bar is not in doubt. Assuming, for the purposes of this case, that the defense of assumed risk would not have been otherwise available to the defendant, there is nothing in the evidence to show that the plaintiff had reason to apprehend this particular act of negligence of the defendant or its agents. At no time during the trial was it claimed that the conductor did not have authority to excuse the plaintiff as he did, or to direct when the work should commence, when it should end, when the train should start, when it should stop and where it should go in the performance of the work. The conductor's *act* in starting the engine was the act of an employee, and not one of superintendence. His *decision* to run the engine himself was within the scope of his authority, if he deemed it necessary or elected to do so in furtherance of the enterprise over which he then had control. By their verdict the jury decided that when he undertook to switch the caboosè from the main line to the side-track, it was his aim to advance the work intrusted to him by the defendant. From this it necessarily follows that the jury deemed that to be an act within the scope of his authority. His negligence in this respect must, therefore, stand as the negligence of the company.

The verdict of the jury was for \$10,000 damages. Is there [3,4] enough conflicting evidence in the record upon which the award can find room to stand? When the proof is as we find it here, so inherently weak, and the statement of the plaintiff so extravagant that they appear unreasonable to the average mind, the case should be returned to the court below for further proceedings. What does the record show? The plaintiff's own testimony is that he was fifty-six years of age, his average earn-

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ings were \$130 per month on a basis of twenty-two and one-half cents per hour, and that he would "sometimes work eighteen, twenty, or twenty-two hours a day." To have earned \$130 per month he would have been obliged to work a little less than twenty hours each day during a month of thirty days. It would be an imputation upon human intelligence to assume that a jury of reasonable men, after due deliberation, could believe that, at his age, he could constantly endure a strain so severe. The evidence of a witness, to be credible, must be within reason. Yet the size of the verdict is conclusive evidence that the jury did not take into consideration the fact that his earning capacity would be impaired by advancing age, and that they gave full credit to his statements regarding the pain he suffered, and the severity and permanency of his injuries. He stated that he had lost a few pounds in weight, suffered from pain which walking produced in his hip, the pain forcing him to assume a slightly stooping position, but that by so walking he found relief from the pain. Dr. McKenzie, the physician who attended him in the hospital at Havre, testified that when he left that institution there were no visible signs of injury upon his body. In the whole of the medical testimony upon the trial no witness ventured the opinion that his injuries were incurable or permanent. His own physician, Dr. Joyce, who came from Jamesville, Minnesota, to testify in his behalf, would not do so and his interest inclined him most favorably to the plaintiff's cause. He testified that he had attended him two years prior to the trial for a fractured rib, after which he was able to work and showed no after effect; that he also attended him after the occurrence of the accident in question here and treated him for the injuries complained of; that he had X-ray plates made of the injured parts which he did not produce upon the trial, but admitted that they showed no permanent injury; that he examined his urine, stating that he did not "find anything out of the way with that—nothing to indicate any of the vital organs out of order. Placing myself as a neutral between the parties, and bearing in mind the responsibilities of a doctor, I wouldn't feel that I can state

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whether or not Mr. Wegge's injuries are permanent. I could not state positively."

When the evidence is all considered in connection with the undisputed fact that the plaintiff was able to get around and conduct a substantial restaurant business, it is difficult to avoid the conviction that the award of damages was not founded altogether upon the evidence in the case; and, when thrown into the scale with the undisputed fact that at the time of the trial he was managing and operating this business with little, if any, detriment to his activities on account of his injuries, a verdict so large fails to commend itself to the judicial mind. Upon this branch of the case, the law found in the opinions of Chief Justice Brantly written for this court in *Hall v. Northern Pac. Ry. Co.*, 56 Mont. 537, 547, 186 Pac. 340, and *Cornell v. Great Northern Ry. Co.*, 57 Mont. 177, 187 Pac. 902, is controlling. (See, also, *Conway v. Monidah Trust*, 51 Mont. 113, 149 Pac. 711.) Reiteration now is wholly unnecessary. From the evidence as a whole, the conclusion that he suffered some injury and experienced some pain was justified. But the loose and unconsidered statements of the plaintiff under oath relative to the number of hours he worked furnish ground enough, it seems to us, for the inference that the verdict was not reached by a fair analysis of the evidence and an effort to adjust the rights of the party without the unbalancing effect of sympathy for one party and prejudice against the other.

On this ground we are of opinion that the judgment should be reversed and a new trial awarded. So ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS and HOLLOWAY concur.

MR. JUSTICE GALEN, not having heard the case presented nor participated in the deliberations of the court with respect to this appeal, takes no part in this opinion.

Rehearing denied January 7, 1922.

HASSAN, APPELLANT, v. EARLL, RESPONDENT.

(No. 4,557.)

(Submitted October 29, 1921. Decided November 28, 1921.)

[202 Pac. 581.]

*Criminal Law—Bail—Nature of Undertaking—Abandonment of Charge—Forfeiture—Void Judgment.***Cash Bail—Justice Courts—Preliminary Examination—Nature of Undertaking.**

1. By a deposit of cash by one accused of crime, in lieu of bail, with a justice of the peace, to assure his appearance at a preliminary examination, the accused enters into a contract with the state which, in legal effect, impliedly contains all of the terms of a bail bond if given for the same purpose, the gist of the contract in either case being that he will appear in the justice court at a specified time, and not in any other court, nor in the justice court at any other time than that specified.

Same—What Equivalent to Dismissal of Charge.

2. Where a justice of the peace failed to hold a preliminary hearing for appearance at which one accused of crime had made a cash deposit, and the county attorney subsequently filed an information in the district court against accused for the same offense, the result was an abandonment of the proceedings in the justice court equivalent to a dismissal of the charge by the state, entitling accused to a return of the deposit.

Same—Jurisdiction—Forfeiture of Bail—When Judgment a Nullity.

3. Upon the filing of an information charging larceny a bench warrant was issued and accused ordered admitted to bail in the sum of \$1,000. The warrant was not served, the accused not arrested and the bail not furnished. Accused under a charge for the same offense had furnished cash bail in the same amount in a justice court under the circumstances above. The district court rendered judgment declaring accused's bail bond forfeited, and the justice delivered the money in his hands to the clerk of the district court who applied it to the satisfaction of the judgment. *Held*, in an action against the justice to recover the cash bail, that the district court never having acquired jurisdiction over accused and, the latter never having furnished bail in that court, the judgment was a nullity, and that plaintiff was entitled to recover.

Appeals from District Court, Cascade County; John J. Greene, Judge

ACTION by Abram Hassan against John T. Earll, Sr. From a judgment of dismissal and an order denying a new trial, plaintiff appeals. Reversed and remanded, with directions.

Mr. W. P. Costello, for Appellant, submitted a brief and argued the cause orally.

While not specifically so found by the trial judge, the fair deduction from the findings is that the court took the view that even though the money was received by respondent without lawful authority, the appellant may not recover it in this action. Such is clearly not the law, and the judgment should have been for the appellant. The right of the depositor to recover his deposit, unlawfully received by a magistrate, is clearly established. (*Brasfield v. Milan*, 127 Tenn. 561, 44 L. R. A. (n. s.) 1150, 155 S. W. 926; *Applegate v. Young*, 62 Kan. 100, 61 Pac. 402; *McNamara v. Wallace*, 97 App. Div. 76, 89 N. Y. Supp. 591; *State v. White*, 40 Wash. 560, 2 L. R. A. (n. s.) 563, 82 Pac. 907; *Doane v. Dalrymple*, 79 N. J. L. 200, 74 Atl. 964; *State v. Owens*, 112 Iowa, 403, 84 N. W. 529; *People v. Laidlaw*, 102 N. Y. 588, 7 N. E. 910; *Whiteaker v. State*, 31 Okl. 65, 119 Pac. 1003; *Commonwealth v. Sitler*, 261 Pa. St. 261, 104 Atl. 604.) In fact, there appears to be no case in the books where the right to recover such a deposit has been questioned. In the cases of *Cooper v. Rivers*, 95 Miss. 423, 48 South. 1024; *Columbus v. Dunnick*, 41 Ohio St. 602; *State v. Reiss*, 12 La. Ann. 166, and *Smart v. Cason*, 50 Ill. 195, while a recovery was denied, the decision in each case was based on an exception to the general rule, and on peculiar statutes. In all of these cases, common-law bail was either expressly or by fair inference recognized. In our state it is well settled that common-law bail does not exist. (*State v. Lagoni*, 30 Mont. 472, 477, 76 Pac. 1044.) In some of these cases relief was denied because of a special bail statute peculiar to those states, but all of the cases are distinguishable from the case at bar for the reason that in each of these cases there was an agreement by the defendant to appear—a pact—and a violation thereof by the defendant, and fraud or bad faith, or both, were deciding elements, and a criminal charge was pending against the

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accused, which he failed to meet. No such conditions obtained in the case at bar.

Messrs. Cooper, Stephenson & Hoover, for Respondent, submitted a brief; *Mr. W. H. Hoover* argued the cause orally

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 25, 1918, the county attorney of Cascade county filed with John T. Earll, Sr., justice of the peace at Great Falls, a complaint, charging Abram Hassan with the commission of a felony. On the same day a warrant was issued and served, the accused brought into court and arraigned, his plea of not guilty entered, and he was thereupon released from custody upon depositing with the justice of the peace \$1,000 in lieu of bail. Hassan did not waive a preliminary examination, nothing was said about such examination, and no time was fixed for his appearance in court again; in fact, nothing further was ever done or contemplated by the officers to be done in the matter, in the justice of the peace court.

On January 4, 1919, permission was obtained by the county attorney to file an information in the district court, charging Hassan with grand larceny. The order provided also that a bench-warrant should issue for the arrest of the accused, and that he be admitted to bail in the sum of \$1,000. The information was filed, and described the same offense as that with which the accused was charged in the justice of the peace court. So far as disclosed by the record, the bench-warrant was never issued, the accused was never arrested, and never appeared in the district court.

On January 13, the district court made an order that Hassan appear for arraignment on January 18, but there is nothing to indicate that this order was ever served or otherwise brought to the knowledge of the accused. On January 18 counsel representing Hassan secured an extension of the time for his appearance to January 23, and on the latter day

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secured a further extension to January 27. On February 5 the district court declared Hassan's bail bond forfeited, and rendered and had entered a judgment in favor of the state and against him for \$1,000.

On February 28, Earll, the justice of the peace, delivered to the clerk of the district court the \$1,000 which Hassan had deposited in the justice of the peace court in lieu of bail, and on the same day the clerk applied the money in satisfaction of the judgment rendered upon the forfeiture of bail. On March 4, Hassan commenced this action against the justice of the peace to recover the \$1,000. Issues were joined, and the cause tried, resulting in findings in favor of the defendant and a judgment dismissing the complaint. From that judgment and from an order denying him a new trial, plaintiff appealed.

After making specific finding upon the proceedings taken in the justice of the peace court, and ignoring entirely the proceedings had in the district court in the criminal case, the court, in this case, declared: "That said criminal proceeding was at the time of the filing of the complaint herein, and still is, pending before the defendant magistrate, John T. Earll, Sr., and that said one thousand dollars (\$1,000) voluntarily deposited in lieu of bail by the plaintiff, Abram Hassan, with the defendant magistrate, has never been discharged or released." The propriety of that conclusion determines the correctness of the judgment. In the foregoing statement every disputed question of fact is resolved in favor of the defendant, and the testimony, on the whole, is construed in the light most favorable to him, upon the theory that every reasonable presumption will be indulged in favor of the trial court's position.

Since the proceeding in the justice of the peace court involved a felony, the authority of the justice of the peace was limited to holding a preliminary examination and taking such steps as were necessary or incidental thereto. (Sec. 8934, Rev. Codes.) Incidentally the justice of the peace

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was authorized to continue the examination from time to time within the limits prescribed by law, and to admit the accused to bail or accept cash in lieu of bail "for his appearance at the time to which the examination is postponed." (Sec. 9080.) In any proper case where a deposit of cash may be accepted in lieu of bail, the accused by making such deposit enters into a contract with the state, which contract, in legal effect, contains all of the terms which would be included in a bail bond given for the same purpose. (*State ex rel. Gleim v. Evans*, 13 Mont. 239, 33 Pac. 1010.)

Bail may be required under different circumstances, and [2] the terms of the bond to be exacted in any particular instance depend upon the purpose for which the bond is given. Illustrative cases are referred to in sections 9448, 9456 and 9480, Revised Codes. No form of bail bond is prescribed where the accused is released pending the hearing on a preliminary examination, but section 9080 above does prescribe that the bond is executed as security for his appearance at the time to which the examination is postponed. That the accused will appear in such court and at such time constitutes the gist of his contract, whether it is evidenced by a written undertaking or its terms are implied from the fact that he deposits money in lieu of bail. He does not agree to appear in any other court, or in the designated court at any other time than that specified. (*State v. Dorr*, 59 W. Va. 188, 115 Am. St. Rep. 915, 8 Ann. Cas. 1016, 5 L. R. A. (n. s.) 402, 53 S. E. 120.)

It would appear self-evidence that the deposit in this instance did not constitute lawful bail, since the accused was not re- [3] quired to appear at any time or place (1 Bishop's New Criminal Procedure, sec. 240b); but, assuming that it did constitute valid bail in the first instance, we are of the opinion that the failure of the justice of the peace to hold a preliminary examination and his failure to take any steps looking to that end, coupled with the act of the county attorney in filing an information against the accused in the district court for

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the same offense, constituted an abandonment of the proceedings in the justice of the peace court equivalent to a dismissal of that proceeding by the state. The result was an exoneration of the bail which entitled the accused to a return of the money deposited by him. (Section 9533, Rev. Codes.) No decided case directly in point has been called to our attention, but each of the following cases has some measure of relevancy to the question presented. (*State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044; *United States v. Backland* (C. C.), 33 Fed. 156; *Hall v. Commonwealth* (Ky.), 30 S. W. 877; *Belt v. Spaulding*, 17 Or. 130, 20 Pac. 827.)

The theory adopted by the trial court would lead to the conclusion that a justice of the peace may accept cash in lieu of bail, refuse or neglect to proceed further, and retain the money indefinitely, but such a conclusion does not recommend itself or conform to any well-recognized theory of orderly administration of justice.

So far as the proceedings taken in the district court in the criminal case are concerned, it is sufficient to say that the court never acquired jurisdiction over the person of the accused, never admitted him to bail, and since the accused did not give bail in that court, or for his appearance in that court, the order declaring his bail bond forfeited was a nullity, to say the least of it.

The judgment and order are reversed and the cause is remanded to the district court, with directions to enter judgment in favor of the plaintiff according to the prayer of his complaint.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

HUNT, RESPONDENT, v. VAN, APPELLANT.

(No. 4,555.)

(Submitted October 31, 1921. Decided November 28, 1921.)

[202 Pac. 573.]

Assault and Battery—Damages—Excessive Verdict—Trial—Continuance—Discretion—Instructions—Abstract Rules of Law—Witnesses—Collapse on Stand—Effect on Jury—Presumptions.

Trial—Continuance—Discretion—Review.

1. A motion for a continuance on the ground of the absence of a witness is addressed to the discretion of the trial court, its action not being reviewable on appeal in the absence of an affirmative showing of prejudice to the movant.

Same—Continuance—Affidavits—Insufficiency.

2. Affidavits for a continuance not showing when the subpoena for an absent witness was issued, why it was sent to the sheriff of a county other than that of the residence of the witness, or that there was probability or possibility that his personal attendance or deposition could be procured at a date later than that set for trial, were insufficient to show in overruling the motion.

Same—Abstract Rules of Law—Instructions—When not Reversible Error.

3. The giving of an instruction embodying an abstract rule of law, though erroneous, is not ground for reversal if sufficient qualification and explanation thereof is found in other instructions so that when read together and as a whole it appears that the issues were fully and fairly submitted to the jury.

Same—Assault and Battery—Collapse of Plaintiff (a woman) on Witness-stand—Effect on Jury—Presumptions.

4. Unless the record affirmatively discloses that the collapse of a witness (plaintiff, a woman) on the witness-stand, in an action for damages for assault and battery, was prearranged and intended as a fictitious appeal to the jury to secure an unfair advantage, it will be presumed on appeal that the verdict was properly arrived at, uninfluenced by any extraneous matter.

Assault and Battery on Woman—What not Excessive Verdict.

5. *Held*, that a verdict for \$3,000 as damages for assault and battery committed on a woman was not so excessive as to warrant the granting of a new trial on the ground that the jury was influenced by passion and prejudice in arriving at it.

3. Abstract proposition of law stated in instruction without applying same to facts of case as reversible error, see note in *Ann. Cas.* 1915D, 1128.

5. Adequacy or excessiveness of verdict in action for assault and battery, see notes in 16 *Ann. Cas.* 46; *Ann. Cas.* 1913A, 1380; *Ann. Cas.* 1916B, 393, 451.

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Appeals from District Court, Prairie County; George P. Jones, Judge.

ACTION by Mrs. Effa Evelyn Hunt against Oliver Van to recover damages for assault and battery. From a judgment for plaintiff, and from the order denying defendant's motion for a new trial, defendant appeals. Affirmed.

Mr. T. M. Murn and *Messrs. Loud & Leavitt*, for Appellant, submitted a brief; *Mr. Charles H. Loud* argued the cause orally.

While the courts hold that the question of whether or not a verdict is excessive must be determined from a consideration of the facts and circumstances of each particular case, yet we understand that ordinarily in the determination of this question the courts will resort to a consideration of the cases from other jurisdictions wherein verdicts under similar facts have been set aside as being excessive. As illustrating what the courts of other jurisdictions have regarded as excessive verdicts in assault cases, we cite the following cases:

In *Hennies v. Vogel*, 87 Ill. 242, an assault on a woman with a hatchet, a verdict of \$1700 was held to be excessive. In *Goetz v. Ambs*, 27 Mo. 28, a verdict of \$2,000 held excessive. In *Turton v. New York Recorder*, 3 Misc. Rep. 314, 22 N. Y. Supp. 766, a case for damages for ejection from a ferry-boat and assault, a verdict of \$1,500 was held to be excessive. In the case of *Roades v. Larson*, 50 N. Y. St. Rep. 551, 21 N. Y. Supp. 855, a verdict of \$5,000 was held to be excessive and the plaintiff was required to remit \$3,000 of this amount. In the case of *St. Peter v. Iowa Telephone Co.*, 151 Iowa, 294, 131 N. W. 2, a verdict of \$2,000 was held to be excessive, and it was ordered that one-half of that amount be remitted. In *Kehl v. Burgener*, 157 Ill. App. 468, a case in which a woman was assaulted by a man, the verdict of \$1,000 was held to be excessive and was reduced to \$600. The case of *Matson v. Matson*, 105 Me. 152, 73 Atl. 867, was an assault

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case and the injuries as shown were as severe as those sustained by the plaintiff in the case at bar. Verdict was reduced to \$300. In *Whitlock v. Northern Pac. Ry. Co.*, 59 Wash. 15, 109 Pac. 188, a verdict of \$1,000 was reduced to \$500. In *Zimmerman v. Northern Pac. Ry. Co.*, 157 Wis. 514, 147 N. W. 1039, the assault was with a club and the plaintiff was severely injured. A verdict of \$1,200 was held excessive and reduced to \$500.

The case of *Rees v. Rasmussen*, 5 Neb. (Unof.) 367, 98 N. W. 830, was an action for an assault and the injury received was a fracture of one of the bones of plaintiff's arm. There, as in the case at bar, no permanent injury was shown. A verdict of \$1,025 was held to be excessive and the defendant in error was required to remit the sum of \$350. In *Birmingham R. etc. Co. v. Ward*, 124 Ala. 409, 27 South. 471, there was slight bodily injury, and additionally mental suffering and humiliation caused by abusive language. A verdict of \$1,450 was held to be excessive. In *Dancey v. Grand Trunk R. Co.*, 19 Ont. App. 644, a verdict of \$1,000 was held to be excessive and was reduced to \$500. This court has held that while the amount of damages to be awarded is largely in the discretion of the jury, this discretion is not unlimited or to be exercised arbitrarily. (*De Celles v. Casey*, 48 Mont. 568, 139 Pac. 586.)

Mr. Geo. W. Farr and *Mr. Jos. C. Tope*, for Respondent, submitted a brief; *Mr. Tope* argued the cause orally.

This court has held that no hard-and-fast rule can be established for allowing a maximum compensation in personal injuries cases, and that each case must depend upon the facts and circumstances surrounding the same; that the amount to be awarded is to be left to the discretion of the jury, and that the damages so awarded, even if comparatively large, will not be held determinative of an abuse of such discretion unless so disproportionate to the injury complained of as to shock the moral senses. (*Lewis v. Northern Pac. Ry.*

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Co., 36 Mont. 207, 92 Pac. 469; *Chenoweth v. Great Northern Ry. Co.*, 50 Mont. 481, 148 Pac. 330; *Chicago Title & Trust Co. v. O'Marr*, 25 Mont. 242, 64 Pac. 506.)

The supreme court of Arizona held in the case of *Hageman v. Vanderdoes*, 15 Ariz. 312, Ann. Cas. 1915D, 1197, L. R. A. 1915A, 491, 138 Pac. 1053, that "The mere fact that the amount of the verdict exceeds our idea of the proper sum recoverable under the evidence, if such should be the fact, is not sufficient to justify the court in annulling the verdict." In this same case, which was one for damages for an assault, the court held that a verdict of \$6,500 was not excessive. The injury inflicted to the plaintiff in the case above cited was in no degree as great as that of the injuries the plaintiff in the case at bar received.

In the case of *Clark v. Aldenhoven*, 26 Colo. App. 501, 143 Pac. 267, \$2,500 was held not to be excessive for an assault. In *Winston v. Terrace*, 78 Wash. 146, 138 Pac. 673, a case for threatening a woman with a revolver and ordering her out of a house, a verdict of \$2,000 was held not excessive. In the case of *Fitch v. Huff*, 218 Fed. 17, 134 C. C. A. 31, an assault case, \$3,000 was held not excessive. In *Schafer v. Ostmann*, 172 Mo. App. 602, 155 S. W. 1102, an assault case, \$2,400 was held not excessive.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

Plaintiff below brought action against the defendant, alleging that on or about June 1, 1917, the defendant did "wrongfully, violently, and maliciously" commit an assault and battery upon her, to her damage in the sum of \$5,000. Answer was a general denial. Verdict and judgment were in favor of plaintiff for \$3,000. Defendant's motion for a new trial was denied, and the cause is here by appeal from both the judgment and the order denying the motion.

Appellant's specifications 1 and 2 assign as error the order [1, 2] of the court refusing to grant his motion for a con-

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tinuance. The ruling upon such motion must be guided by the discretion of the court, and its action in that regard is not subject to review, in the absence of an affirmative showing of prejudice by the unsuccessful party (sec. 6729, Rev. Codes; *Downs v. Cassidy*, 47 Mont. 471-475, Ann. Cas. 1915B, 1155, and cases cited, 133 Pac. 106); nor is that diligence disclosed in the affidavits for continuance which is indispensable, in that it does not appear when the subpoena was issued for the absent witness, why the subpoena was sent to the sheriff of Custer, instead of Dawson county, why it was not served or returned when later sent to the deputy sheriff of Dawson county, nor was it claimed there was either possibility or probability that the personal attendance of the witness or his deposition could be procured at any later date. There was no error in the ruling. (*Meredith v. Roman*, 49 Mont. 204, 215, 141 Pac. 643.)

Over appellant's objection, the court instructed the jury [3] that: "You are instructed that every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily harm or from personal insult." The giving of abstract rules of law, such as this, has been condemned by this court, but, though erroneous, is not cause for reversal, provided sufficient qualification and explanation thereof is found in other instructions, so that when read together and as a whole it appears the issues were fully and fairly submitted to the jury. We think this requirement was met in other instructions. (*Surman v. Cruse*, 57 Mont. 253, 187 Pac. 890.)

Specifications 4 and 5 assigning error in refusal of the court to give certain instructions offered by defendant are without merit, since it appears their substance was amply covered in other instructions. (*Surman v. Cruse*, *supra*.)

Error is predicated upon the conduct of the plaintiff in [4] open court, it being claimed that her display of nervousness and "collapse" in the presence of the jury prevented defendant from having a fair trial. We know of no power or

rule of law by which the court is enabled to control the emotions of parties to a trial in court, and in the absence of some affirmative disclosure that the "collapse" was prearranged and intended as a fictitious appeal to the jury, and to secure an unfair advantage, this court must presume that the verdict was found in accordance with the evidence and law given by the court and uninfluenced by any extraneous matter.

The last contention of appellant is that the court erred in [5] its refusal to grant a new trial because of the excessiveness of the verdict. Within the limits fixed in the pleadings it is the province of the jury to name the amount. There must, of course, in all cases, be substantial evidence to support the award of the jury. In actions founded upon a contractual relation, where the actual damages can be arrived at by computation, a verdict exceeding the amount disclosed by the evidence to be recoverable will be set aside and a new trial ordered, unless remission of the excess is made by the prevailing party. And likewise in tort, where the sum fixed by the jury is unconscionable, or it is evident from the proof of the injury sustained that the jury must have been influenced by passion and prejudice, a new trial may be granted, unless the successful party remit a portion of the recovery fixed by the verdict. This court said, in *Jones v. Shannon*: "There is no standard of measurement by which to determine the amount of damages to be awarded, other than the intelligence of the jury, made up of impartial men governed by a sense of justice. To the jury, therefore, is committed the exclusive task of examining the facts and circumstances of each case and valuing the injury and awarding compensation in the shape of damages. 'The law that confers on them this power, and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties in the examination of heterogeneous matters of fact, where no criterion can be ap-

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plied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose.' (1 Graham & Waterman on New Trials, p. 451).'' (*Jones v. Shannon*, 55 Mont. 225, 237, 175 Pac. 882, 886.)

It is not contended by appellant that the evidence does not support a finding for damages in some amount, but it is strenuously urged that the sum fixed is so far in excess of fair compensation for the injury sustained as to be unconscionable and to establish passion and prejudice of the jury in arriving at the amount. With this we cannot agree. We think the evidence of the plaintiff justified a finding for substantial damages, that the sum found is not unconscionable, and therefore we are without authority to order a reduction in the amount.

We find no error in the record to warrant a reversal, and therefore recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

MIDLAND COAL & LUMBER CO., RESPONDENT, v. FERGUSON ET AL., APPELLANTS.

(No. 4,534.)

(Submitted October 31, 1921. Decided November 28, 1921.)

[202 Pac. 389.]

Mechanics' Liens—Notice of Lien—Erroneous Description of Property—When Nonprejudicial—Foreclosure Sale—Error in Return of Sheriff—Removal of Building—Waiver of Right—Pleading.

Mechanics' Liens—Title to Land not in Lienee—Extent of Lien.

1. Where title to the land on which a building was constructed with material furnished by plaintiff is not in the lienee, the lien extends to the building only, and in such a case any error or mistake in the description of the land in the notice of lien does not affect the validity of the lien if the "property"; i. e., the building, can be identified. (Rev. Codes, sec. 7291.)

Same—Description of Land—Degree of Correctness Required.

2. A mechanic or materialman is not required to employ a surveyor to locate the building sought to be charged with a lien in order to enable him to obtain a correct description of the land on which it is situated, the description of the land being resorted to only as a means for identifying the building.

Same—Erroneous Description of Building—When Nonprejudicial.

3. Where the description of the building sought to be charged with a materialman's lien is sufficient to enable a person familiar with the locality to point it out as the only one corresponding with the description in the lien, it is sufficient, and if by rejecting what is erroneous in the description enough remains to identify the particular property sought to be charged, the lien will be upheld.

Same—Erroneous Description of Land—When not Fatal to Lien.

4. Under the above rules, *held*, that where a lienor in its lien notice had described the land for a building on which it had furnished materials situate on the NE. $\frac{1}{4}$, whereas in fact it was on the NW. $\frac{1}{4}$ of a certain section, but so close to the line between the two forties that it would have required the services of a surveyor to ascertain its exact location, the error did not vitiate the lien, in view of the fact that the building was the only one of its kind in the vicinity and easily identified.

Same—Foreclosure Sale—Error in Sheriff's Return in Designation of Purchaser—Effect.

5. An error made by a sheriff in his return of a lien foreclosure sale in his designation of the purchaser cannot work to the prejudice of the latter.

1. Mechanics' liens on buildings or improvements as distinct from land on which located, see note in 2 *Ann. Cas.* 689.

Estates and interests affected by mechanics' liens, see note in 45 *Am. Dec.* 678.

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Same—Purchaser at Foreclosure Sale—Question of Fact.

6. Where in his return of a lien foreclosure sale the sheriff recited that the property had been sold to one R., "agent for" plaintiff company (lienor), the question whether R. purchased it for himself or the company was one of fact determinable by the court.

Same — Foreclosure Sale — Removal of Building from Land — Waiver of Right—Pleading.

7. While failure of the purchaser of a building at a lien foreclosure sale to remove it from the land within a reasonable time will operate as a waiver or forfeiture of the right, the question of waiver or forfeiture cannot be considered unless pleaded.

Appeals from District Court, Carter County; Geo. P. Jones, Judge.

ACTION by the Midland Coal & Lumber Company against Richard W. Ferguson and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Mr. Leon L. Wheeler, for Appellants, submitted a brief; *Mr. Chad. A. Spaulding*, of Counsel, argued the cause orally.

Messrs. Loud & Leavitt, for Respondent, submitted a brief; *Mr. Chas. H. Loud* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Between March 14 and May 7, 1914, the Midland Coal & Lumber Company sold and delivered to Emily Fuller lumber and other building materials which were used in the construction of a frame dwelling-house upon lands the title to which was then in the government of the United States. Within the time allowed by law the lumber company filed a notice of lien, and thereafter, in an action to foreclose the lien, such proceedings were had that a judgment of foreclosure was duly given and made, and an order of sale issued, pursuant to which the sheriff sold the building at public auction on December 31, 1915.

In his return, the sheriff recited that he sold the property "to G. E. Raymond, agent for Midland Coal & Lumber Com-

pany." In the notice of lien, the building was described as a one-story frame dwelling-house, twenty-four feet by twenty-six feet in dimension, and situated on the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, section 29, township 2 north, range 58 east, in Fallon (now Carter) county. Throughout the foreclosure proceedings the building was described in like manner, except that it was located upon the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of section 29. After the materials were furnished, but before the lien was filed, patent for the entire NW. $\frac{1}{4}$ of section 29 issued to Richard H. Ferguson, who, in June, 1916, sold the building to Guy W. Stetser, and it was removed to a location some distance away. This action was brought by the lumber company against Ferguson and Stetser to recover possession of the building, or its value in case return could not be had, and for damages. After issues joined, the cause was tried to the court without a jury, resulting in a judgment for plaintiff, from which judgment, and an order denying a new trial, defendants appealed.

The principal contention made is that plaintiff failed to [1-4] prove that it ever acquired title to the building. That contention has its foundation in these propositions: (1) If the building was situated on the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of section 29, the lien was void because of the erroneous description contained in it; or (2) if the building was situated on the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of section 29, then the property involved in the foreclosure proceedings was not the same property as that described in the lien, and, in either event, title to the building was not conveyed by the sheriff's sale.

It is conceded that the building was situated upon the NW. $\frac{1}{4}$ of section 29, and upon either the NE. $\frac{1}{4}$ or NW. $\frac{1}{4}$ of that quarter-section. Since the judgment in the foreclosure proceedings recites that it was upon the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, the presumption will be indulged that ample evidence was received in that proceeding to justify the finding, or, in other words, for every purpose of this case, it must be accepted as established that the building was situated upon the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and that the recital in the lien that it was upon the

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NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ is erroneous. Does that erroneous description vitiate the lien? Since title to the land was not in Emily Fuller, the lien extended to the building only. (Secs. 7293-7295, Rev. Codes; *Stritzel-Spaberg Lumber Co. v. Edwards*, 50 Mont. 49, 144 Pac. 772.) Section 7291, Revised Codes, provides: "But any error or mistake in the * * * description does not affect the validity of the lien, if the property can be identified by the description." And the term "property," as therein used, refers to the building, structure, or other improvement, and not to the land. (*Stritzel-Spaberg Lumber Co. v. Edwards*, above.)

The reason for the statutory rule is apparent. If the same strictness were required in describing property involved in a mechanic's lien as in a conveyance of real estate, the owner of the property sought to be charged might prevent the lien claimant obtaining a correct description, and thereby defeat the very purpose of the lien law. The lien claimant herein was not required to employ a surveyor to locate the building sought to be charged, and the description of the land is resorted to only as a means of identifying the building. (*Western Iron Works v. Montana Pulp & Paper Co.*, 30 Mont. 550, 77 Pac. 413.) But the description of the land is not the only means of identification. If the description of the building itself is sufficient to enable a person familiar with the locality to point it out as the only one corresponding with the description contained in the lien, it meets all the requirements of the statute, and if, by rejecting what is erroneous in the description contained in the lien, enough remains to identify the particular property sought to be charged, the lien will be upheld. (*Johnson v. Erickson*, 56 Mont. 550, 185 Pac. 1116.) In the lien the building is described as situated upon "the northeast quarter of the northwest quarter of section twenty-nine (29), township two (2) north, range fifty-eight (58) east," etc. If we reject the words "the northeast quarter of," that which remains will be technically accurate so far as it goes, and will be sufficient, if, with the description

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of the building itself, there is such identification of the property to be charged as will enable one familiar with the locality to locate it. And whether a given description is sufficient or not depends upon the surrounding circumstances, the character of the particular building, its situation with reference to others, etc.

The record discloses that the Fuller residence was known generally in the neighborhood by that name, was situated upon rural lands, that it was about a mile north of the town of Ekalaka, and that there was not another residence in the same vicinity. It is left somewhat in doubt whether there was another residence upon the northwest quarter of section 29; but, if there was, the other one was in the town of Ekalaka, so that the sheriff could not have any difficulty, and did not have any, in locating the particular property which he was called upon to sell. The error in the description of the land as contained in the lien is accounted for by the fact, as disclosed by the evidence in this case, that the building was situated so near the line dividing the northeast 40 from the northwest 40 that it might well be said that a survey would be necessary to determine its exact location.

In *Goodrich Lumber Co. v. Davie*, 13 Mont. 76, 32 Pac. 282, and in *Johnson v. Erickson*, above, the lien was sought to be impressed upon the land as well as upon the improvements, and in each instance, if the erroneous description of the land contained in the lien had been eliminated, there would not have remained any description from which the building could have been identified, and for that reason the lien in each instance was held to be invalid. In *Western Iron Works v. Montana Pulp & Paper Co.*, above, the lien was upheld, although there was an erroneous description of the land contained in the lien, for the building sought to be charged was otherwise sufficiently described to identify it. In *Bender-Moss on Mechanics' Liens*, section 402, it is said: "There is great reluctance to set aside a mechanic's claim merely for loose description, as the Acts generally contemplate that the claim-

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ants should prepare their own papers, and it is not necessary that the description should be either full or precise."

Our conclusion is that the erroneous description of the land does not vitiate the lien.

As observed heretofore, the sheriff in his return of sale [5-6] recited that he sold this building, "to G. E. Raymond, agent for Midland Coal & Lumber Company," and it is the contention of defendants that the words "agent for Midland Coal & Lumber Company" are *descriptio personae*, and that title passed to Raymond, and not to the lumber company; but Raymond testified that he purchased the property for the lumber company, and this is not disputed. We are of the opinion that the real purchaser cannot be prejudiced by the mere erroneous recital of a ministerial officer, over whose return he had no control. Whether the sale was made to Raymond or to the lumber company was a question of fact, which the trial court resolved in favor of the plaintiff. There is not any claim advanced that these defendants were, or that either of them was, prejudiced by the erroneous recital in the sheriff's return.

After the plaintiff purchased the building at sheriff's sale, [7] it was entitled to a reasonable time within which to remove the building from Ferguson's land. (Section 7295, Rev. Codes.) Its failure to exercise the right given, within a reasonable time, would operate as a waiver or forfeiture of the right. (*Priebatsch v. Third Baptist Church*, 66 Miss. 345, 6 South. 237.) The pleadings do not raise the question of waiver of forfeiture, and that question was not, and could not be, considered by the trial court.

The other specifications of error do not require particular consideration. The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

AMERICAN SAVINGS BANK & TRUST CO., APPELLANT,
v. CHAPMAN, RESPONDENT.

(No. 4,435.)

(Submitted September 15, 1921. Decided November 28, 1921.)

[202 Pac. 385.]

*Pleading—Corporate Capacity—Denial—Sufficiency — Evidence
—Judicial Notice—Statutory Laws of Other States.*

Pleading—Corporate Capacity—Denial—Sufficiency.

1. While a general denial does not raise the question of plaintiff's corporate capacity, an allegation in the answer denying that defendant has, and averring that he "has not, sufficient information or knowledge to form a belief as to the truth" of plaintiff's averment that it is a duly organized and existing corporation, puts plaintiff upon proof of that fact.

Evidence—Statutory Laws of Other States—Judicial Notice.

2. Courts of this state do not take judicial notice of the statutory laws of another state; hence, since certified copies of public records of a foreign state, if admitted in evidence in this state, can be given only such faith and credit as would be given them in the foreign state under its laws, it is incumbent upon the party introducing them to show what the law of that state is in that respect, otherwise the court may disregard them.

Appeals from District Court, Beaverhead County; William A. Clark, Judge.

ACTION by the American Savings Bank & Trust Company against Clara Chapman. From a judgment for defendant and an order denying its motion for a new trial plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

Messrs. Norris, Hurd & Collins, for Appellant.

Plaintiff in its amended complaint alleges its corporate capacity, to which, in her answer, the defendant "denies that she has and alleges that she has not sufficient information or knowledge to form a belief as to the truth of said allegation." That this does not raise an issue with respect to plaintiff's corporate capacity, see *O'Donnell v. Butte*, 44 Mont. 97, 119

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Pac. 281; *First Nat. Bank v. Smith*, 44 Mont. 305, 119 Pac. 784; *Willoburn Ranch Co. v. Yegen*, 49 Mont. 101, 140 Pac. 231.

The original certificate of incorporation, together with the certified copy of articles of incorporation introduced by plaintiff, are sufficient to prove plaintiff's corporate capacity, even if denied in defendant's pleading. Since no objection was made to the introduction of plaintiff's exhibits 1A, 2A and 3A, there is no issue as to their competency. In other words, evidence when so admitted, will be given its probative value, if relevant. (17 Cyc. 800; *Langworthy v. Coleman*, 18 Nev. 440, 5 Pac. 65; *Mushet v. Fox*, 6 Cal. App. 77, 91 Pac. 534; *Jaggar v. Plunkett*, 81 Kan. 565, 25 L. R. A. (n. s.) 925, 106 Pac. 280; *Dane v. Bennett*, 51 Okl. 684, 152 Pac. 347; *Leonard v. Mixon*, 96 Ga. 239, 51 Am. St. Rep. 134, 23 S. E. 80; *Brahe v. Kimball*, 7 N. Y. Super. Ct. (5 Sand.) 237; *Sherwood v. Sissa*, 5 Nev. 349; *Dalton v. Dalton*, 14 Nev. 419, 426; *McCloud v. O'Neill*, 16 Cal. 392.)

It is not disputed that plaintiff's exhibit 3A is an original certificate of incorporation. It, therefore, is sufficient to prove plaintiff's incorporation. (Rev. Stats. 1907, sec. 7924, subd. 7.)

Mr. T. E. Gilbert, for Respondent.

The only questions presented on this appeal under the pleadings are whether plaintiff must prove its corporate capacity in order to maintain the action, and if so, has it proven its corporate capacity sufficiently to maintain this action.

Appellant insists that the allegation in paragraph 1 of the answer does not raise an issue with respect to plaintiff's corporate capacity. In the case of *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995, this court had almost this identical language under consideration, and held that such a denial was a substantial compliance with section 6540, Revised Codes.

Appellant also insists that the original certificate, together with a certified copy of articles of incorporation introduced by plaintiff, are sufficient to prove plaintiff's corporate capacity, even if denied in defendant's pleading. To show that this is incorrect, we again refer to the case above cited, at page 220.

Exhibit 2A does not claim or allege that the said original articles of incorporation of the plaintiff are genuine, but says "that apparently the same are of a genuine, valid and subsisting character." Again, the secretary of state does not state that the original articles of incorporation were duly and regularly filed in his office, but states that "said original articles appear to have been duly and regularly filed"; the original articles can have no probative value.

The denial in the answer is not a general denial but is a specific denial in the language of the Code (section 6540, Rev. Codes). If such a denial is not proper, then it is hard to imagine a case where a defendant can raise the question when, as in this case, plaintiff is a foreign corporation and all its records are in another state and are not accessible to defendant.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

This is an appeal by plaintiff from a judgment rendered in favor of the defendant by the court sitting without a jury, and also from an order of the court denying plaintiff's motion for a new trial. It is alleged in paragraph I of the complaint that the plaintiff is a corporation duly organized, created and existing under and by virtue of the laws of the state of Washington. It is then alleged that a certain promissory note, executed by defendant, and payable to herself, was duly indorsed and delivered to W. S. Summers, and by him delivered to the plaintiff prior to the time the same became due, that the plaintiff is the owner thereof, and that the same has not been paid.

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The defendant in her answer "denies that she has, and alleges that she has not, sufficient information or knowledge to form a belief as to the truth of the allegations set forth in paragraph I of plaintiff's complaint." Defendant further admits signing the instrument alleged in the complaint as a "promissory note," and that she indorsed the same. The answer contains some other denials, and also alleges affirmatively that defendant did not receive any consideration whatever for or on account of the making, executing, or delivery of the instrument set forth in plaintiff's complaint, and designated "promissory note," and that the plaintiff, if it ever took said note, took the same with knowledge thereof. The reply of plaintiff denies the affirmative allegations of the answer.

At the trial of the case plaintiff's witness testified to the indorsement and delivery of the note to the plaintiff prior to maturity, and that the plaintiff did not have any knowledge "of any defect in the title to the note" and that the same had not been paid. Plaintiff further introduced in evidence, without objection, a certificate from the secretary of state of the state of Washington to the effect that he was the legal custodian of the records of corporations in that state, and further stating that he is the secretary of state of the state of Washington and the custodian of the seal of said state; that the articles of incorporation of the plaintiff company were duly and regularly filed in his office and that the copy annexed to this latter certificate was a full, true, and correct copy of the articles of incorporation of the plaintiff company. The copy of the articles of incorporation, so certified under the seal of the state of Washington, was then introduced in evidence. Plaintiff also introduced in evidence as his exhibit 3 the original certificate of incorporation by the secretary of state of the state of Washington, which was afterwards withdrawn and a certified copy substituted therefor. This was all of the evidence.

The court thereupon ordered judgment entered in favor of the defendant for her costs. The appellant claims that the court erred in holding that defendant's answer raised an issue as to plaintiff's corporate capacity, and committed further error in holding that the evidence introduced by plaintiff was insufficient to entitle plaintiff to judgment, and that the evidence was insufficient to sustain a judgment for the defendant.

It has been many times decided by this court that a general denial does not raise the question of the corporate capacity of plaintiff (*Minneapolis Threshing Machine Co. v. Stanford Merc. Co.*, 59 Mont. 359, 197 Pac. 993), but it has also been decided that a denial in the form contained in the answer herein is "sufficient to put plaintiff upon proof of the fact that it was and is a corporation" (*Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 215, 95 Pac. 995).

The courts of this state do not take judicial notice of the [2] statutory laws of another state, and it does not appear in this case, either by the pleadings or by the evidence, that a certified copy of a public record would be admitted or received in evidence by the courts of the state of Washington. Such records, if admitted in evidence, can only be given such faith and credit as would be given to them in the state of Washington, and since there was not any effort made to show what the laws of Washington are respecting the use of certified copies of public records, the district court could not give any effect whatever to such evidence. This question was fully considered and discussed by this court, and determined adversely to the contention of the appellant, in *Milwaukee Gold Extraction Co. v. Gordon*, *supra*.

We recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

STATE, RESPONDENT, v. JUHREY, APPELLANT.

(No. 4,903.)

(Submitted October 28, 1921. Decided November 28, 1921.)

[202 Pac. 762.]

*Criminal Law—Homicide—Jurors — Voir Dire Examination —
Reading Newspaper Reports—Evidence—Cross-examination—
Hearsay.*

Homicide — Jurors — Opinion Founded on Newspaper Reports — Not Disqualification.

1. A juror who on his *voir dire* stated that he had read in the newspapers an account of the homicide for which plaintiff was on trial; that he had formed an opinion therefrom which it would take evidence to remove, but that in determining the case he would base his verdict upon the evidence and be bound by the court's instructions; that there was nothing known to him why he could not try the case fairly, *etc.*, *held* competent.

Same—Jurors—*Voir Dire* Examination—Contradictory Answers—Discretion.

2. Where a juror on his *voir dire* examination gives contradictory answers, it is the function of the trial court to pass upon the evidence and determine the qualifications of the juror, its determination being final unless it appears that there has been abuse of discretion.

Same—Witnesses—Cross-examination—Curtailement, When not Reversible Error.

3. Where a witness for the state had been cross-examined at great length as to her relations with defendant, refusal to allow a further question on the same subject to be answered was not reversible error.

Same—Evidence—Conversation With Deceased—Hearsay.

4. A question whether witness had a conversation with deceased in his lifetime concerning him (deceased) and his wife, was properly excluded as immaterial and hearsay.

Same—Evidence—Sufficiency.

5. Evidence *held* sufficient to warrant conviction of murder in the first degree.

Appeals from District Court, Silver Bow County; J. J. Lynch, Judge.

ASSAD JUHREY, charged under the name of M. A. Juhrey, was convicted of murder in the first degree, and appeals

1. Authorities passing on the question of opinion gained from reading paper as disqualification of juror in criminal case are collated in a note in 35 L. R. A. (n. s.) 984.

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from the judgment of conviction and from the order overruling his motion for a new trial. Affirmed.

Messrs. Canning & Geagan, for Appellant, submitted a brief and argued the cause orally.

The action of the court in accepting the juror, Davis, as a member of the trial jury and overruling the defendant's challenge for cause was an abuse of discretion on the part of the court, which prejudiced the substantial rights of this defendant and prevented him from having a fair trial by an impartial jury as provided by law. We think the rule is that a man with a condition of mind such as the juror, Davis, showed by his examination that his mind was in is not an impartial juror within the constitutional sense of that term. The rule, we take it, in such cases as this, has been very properly stated by the supreme court of the state of Illinois in the case of *Coughlin v. People*, 144 Ill. 140, 19 L. R. A. 57, 33 N. E. 1.

It must be borne in mind at all times in passing upon the qualifications of a juror, in such a case as this, that his impartiality is to be judged of in the constitutional sense. The statute permitting the qualification of jurors who have formed opinions under certain circumstances must not be construed in any other sense than as a means of effectuating the constitutional requirements, *viz.*, an impartial jury. It must not be taken that the statute determines in any way what shall be the probative force of the statement of the juror, or how far it shall have the effect of relieving him from disqualifications that arise from existence in his mind of the opinion. His statements are to be taken as constituting evidence which is to be weighed under all the rules of evidence and given such consideration as it is justly and fairly entitled to receive. This evidence must be of such nature that the court, resolving all doubt in favor of the prisoner, must be satisfied of its truth and that it establishes the competency of the juror beyond a reasonable doubt. (*State v. Brooks*,

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57 Mont. 480, 188 Pac. 942; *Scribner v. State*, 3 Okl. Cr. 601, 35 L. R. A. (n. s.) 985, 108 Pac. 422; *Coughlin v. People*, *supra*; see, also, *People v. Riggins*, 159 Cal. 113, 112 Pac. 862.)

The court in sustaining the objection to the question, "What did you mean by being through with him?" is an instance that illustrates well the rule of this state that there should be a wide latitude allowed in cross-examination. Such error is prejudicial, as it prevents a full investigation of the truth, and is undue limitation upon the right of cross-examination. (*State v. Wakely*, 43 Mont. 427, 117 Pac. 95; *State v. Rhys*, 40 Mont. 131, 105 Pac. 494; *State v. Howard*, 30 Mont. 518, 77 Pac. 50; *State v. Rogers*, 31 Mont. 1, 77 Pac. 293; *Territory v. Garcia*, 15 N. M. 538, 110 Pac. 838; *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254.)

The evidence does not sustain the verdict of guilty of murder in the first degree, for there is no testimony worthy of belief that establishes any premeditation sufficient to be found as existing by the jury. The only witness' testimony that has any tendency to establish premeditation on the part of the defendant is the testimony of the witness, May Gibson, in her statement attributed to the defendant in the following words: "I have come to kill the two of youse." We respectfully submit that this statement in the light of this witness' own testimony is not, and could not be, worthy of belief, for without attempt to leave the house or to get away from the defendant, although she was in a neighborhood where people resided all about her, she remained in the house with him without making any of these attempts from the time of his coming until Gibson came, which was a period of from twenty minutes to half an hour. To properly view this statement of hers and the proper value that should be given to it under the circumstances, it is necessary to read her testimony both on direct and cross-examination contained in the transcript. (*State v. McMillan*, 20 Mont. 407, 51 Pac. 827; *Escalier v. Great Northern Ry. Co.*, 46 Mont. 238, Ann. Cas. 1914B,

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occasionally ask him a question, but the juror repeatedly, during this examination, stated that he would fairly try the case on the evidence produced at the trial. In answer to some of the questions asked him during the course of the extended examination, he made statements which, if standing alone, would indicate a fixed opinion amounting to prejudice. After the completion of the examination of the jurors, the court again examined the juror William Davis as to his qualifications, and the juror again stated that he would disregard any previous opinion, would follow the evidence given at the trial, would obey the instructions of the court, would fairly and impartially and honestly try the case, and that, if he were charged with the crime of murder, he would be willing to have a jury of twelve men of like mind with himself sit upon the case.

Under the provisions of section 9264, Revised Codes, a juror is not disqualified by reason of having formed or expressed an opinion founded upon public rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration under oath, that he can and will, notwithstanding such opinion, act fairly and impartially upon the matter to be submitted to him. The general rule under similar statutes seems to be that: "The fact that a person called as a juror has formed an opinion or impression shall not disqualify him to serve as a juror in such case if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and evidence and the court shall be satisfied of the truth of such statements." (16 R. C. L., sec. 81, p. 264; *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948; *State v. Megorden*, 49 Or. 259, 14 Ann. Cas. 130, 88 Pac. 306; *Scribner v. State*, 3 Okl. Cr. 601, 35 L. R. A. (n. s.) 985, 108 Pac. 422; *People v. Ryan*, 152 Cal. 364, 92 Pac. 853; *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720; *People v. Wolff*, 182 Cal. 728, 190 Pac. 22; *State v. Milosovich*, 42 Nev. 263, 175 Pac. 139; *State v. Anderson*, 24 N. M. 360, 174 Pac. 215; *Smith v. State*, 14

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Okl. Cr. 250, 174 Pac. 1107; *Forte v. People*, 57 Colo. 450, 140 Pac. 789; *State v. Williams*, 28 Nev. 395, 82 Pac. 353.)

In this latter case, the supreme court of Nevada, in discussing the qualifications of a juror, said: "In this era of education, intelligence, and diffusion of knowledge, when the telegraph and cable flash information from the most distant parts of the earth in a few seconds, when an army of men are employed in gathering and reporting the important happenings of the world, and improved printing presses, invented and operated by ingenious minds and cunning hands, are publishing millions of papers daily, the man who does not read and think and form opinions regarding such crimes as murders committed in his locality is better fitted to have lived in the Dark Ages than to serve on juries in the twentieth century. Still, in order to be a good juror, any opinion he may have must be a qualified one, and he must conscientiously feel that he can discard it in arriving at a verdict, and realize that under our system of jurisprudence persons charged with crime are not to be prejudged or convicted upon newspaper reports or hearsay, or found guilty by anything excepting evidence introduced in court under the sanctity of an oath or in conformity to legal practice."

In *People v. Loper*, 159 Cal. 6, Ann. Cas. 1912B, 1193, 112 Pac. 720, 722, the court, in passing upon the qualifications of a juror, said: "The statements of those called for jury duty in this case seem quite typical of those given during the selection of a jury in any case about which there has been extensive comment in the daily journals. Almost every person called into the jury-box had an opinion of defendant's guilt, based upon what he had read, and some of them stated that such opinion would require evidence for its removal. When, however, they were put to the test of their ability to try the case upon the evidence produced at the trial and uninfluenced by other considerations, each answered that he could and would, if chosen, act fairly and impartially. It was the function of the trial court to determine the true state

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of mind of each member of the panel who was questioned touching his qualifications to serve as a juror. Frequently there is a conflict between different portions of the testimony given during an examination on *voir dire*, due not always to the lack of candor on the part of the person examined, but to his misunderstanding of the questions asked and of the duties of a juror, until such duties are explained by the court. When such conflict occurs, the trial court must decide, if possible, which of the answers most truly reveals the state of the talesman's mind. In other words, the questions generally presented are those of fact and not of law"—citing many cases.

In a previous decision, the supreme court of California, in discussing a similar question, said, in part: "During the examination of the jurors impaneled to try the case, three of them gave contradictory answers to repeated questions put to them upon the subject of their ability to disregard opinions as to the defendant's guilt which they had formed from newspaper reports and public rumor, and from the fact that he had been held for trial, and to decide the case upon the evidence alone. Many persons, competent as jurors, have not given much attention to such subjects, are inexperienced as witnesses, and are unable readily to comprehend the force and effect of the language in which such questions are couched, and they generally answer without reflection as to the effect of their own words. Such contradictions are by no means infrequent, if, indeed, they are not the rule, rather than the exception. The trial court must decide which of the answers most truly shows the juror's mind. It should, of course, be liberal in giving the defendant and the people the benefit of any doubts that may arise as to the fairness of the juror and his ability to lay aside preconceived impressions, and should excuse the juror if such doubt is created, but, where there are such contradictions, its decision is binding upon this court"—citing many cases. (*People v. Ryan*, 152 Cal. 364, 92 Pac. 853.)

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It is undoubtedly the rule that, where the evidence relating to the qualification of a juror is in conflict, it is the function of the trial court to pass upon that evidence and determine the qualification of the juror, and this determination of the trial court is final, unless it appears from the record that there has been some abuse of discretion. (See authorities above cited.) "If, upon the whole examination of the juror, it is manifest that the opinion formed by him from reading newspaper accounts of the alleged crime, or upon rumor, is merely hypothetical, or conditional on the truth of the rumor of the newspaper reports read; that he has no settled opinion as to the guilt or innocence of the accused; and that he can render a fair and impartial verdict upon the evidence adduced on the trial, under the instructions of the court, the juror is competent." (*Basye v. State*, 45 Neb. 261, 63 N. W. 811.)

In *People v. Wolff*, *supra*, 182 Cal. 734, 190 Pac., at page 25, the supreme court, in discussing the qualifications of a juror, said: "Juror Blaisdell testified that he knew nothing of the case, except what he had read in the newspapers, that he had formed an opinion therefrom which the evidence might remove, but that, notwithstanding the opinion, he could, and would, act fairly and impartially upon the charge against the defendant, and be guided solely by the evidence produced in court in arriving at a verdict. He further stated that he would retain the opinion until he heard the evidence, that after it had once gotten into his mind he could not put it out until something occurred to change it, but that he could go into the trial of the case presuming the defendant innocent, and depend entirely upon the evidence introduced and the instructions of the court in finding a verdict, and would not in any way permit the matter that he had read in the newspapers to influence his decision. The court, upon his testimony, was justified in holding that the jurors were qualified. A juror who has formed a tentative opinion in that manner will usually say that it will require evidence to

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change the opinion. That fact is not incompatible with ability to disregard such opinion entirely in weighing the evidence and to render a verdict solely upon the evidence. This psychological fact was recognized by the legislature, and section 1076 was enacted to avoid the necessity of sustaining challenges for actual bias in such cases. Its effect is that this state of mind does not disqualify the juror, if, notwithstanding such mental condition, he can and will act impartially and fairly in the case."

The former decisions of this court in construing and analyzing this section of the Code have not been either reversed or modified, but stand as the law of this state, and, as appears from the authorities above referred to, are sustained by the decisions in other jurisdictions. (*State v. Sheerin*, 12 Mont. 539, 33 Am. St. Rep. 600, 31 Pac. 543; *State v. Howard*, 30 Mont. 519, 77 Pac. 50; *State v. Mott*, 29 Mont. 292, 74 Pac. 728.)

The district court did not err in overruling the challenge of the defendant to the juror William Davis.

The views above expressed, relative to the qualification of the juror William Davis, dispose of appellant's assignments of error Nos. 1, 2, 3, and 4. His assignment No. 5 is also based upon the alleged disqualification of the juror and the further intimation is contained in his brief that the court had acted in a partial manner and had, in effect, insisted upon the juror qualifying himself. We find nothing in the record sustaining this charge.

In assignment No. 6 the appellant maintains that the court [3] erred in sustaining objection to the question asked on cross-examination of the state's witness, Mrs. Gibson. The witness had been cross-examined at great length respecting her relationship with the defendant, and her feeling toward him, and the frequency with which she had met him. In answer to these questions, she stated that nearly every time she saw him she had forbidden him to speak to her, and had told him not to see her any more—not to come near her any more;

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but she was further pressed with questions, and the counsel asked, "What did you say to him?" She answered: "I said for him not to come around; I was through with him; I didn't want nothing to do with him." "You told him you were through with him?" "Yes, sir." "What did you mean by being through with him?" Objection was made to this latter question as not proper cross-examination and that it was incompetent, irrelevant and immaterial. The objection was sustained. Counsel in his brief has not enlightened us in what way or manner, if at all, the defendant's case was, or could be prejudiced by the action of the court in sustaining this objection. It is intimated in defendant's brief that the witness may have meant that a promise of marriage between the witness and the defendant was terminated or that she did not want any more of defendant's property. Even conceding this to be the meaning, it was wholly immaterial and irrelevant to any of the issues of the case; but, in the light of her previous testimony just given, we cannot conceive how the jury could be in any manner mistaken as to what she really meant. The court permitted the defendant to prosecute a wide range of cross-examination, covering more than 100 pages of the transcript, in which it would seem, from an examination thereof, that every conceivable question touching relationship existing or supposed to exist between the witness and the defendant, either social or financial, had been fully examined. We are not able to find any error in the action of the court in sustaining this objection.

Assignment No. 7 is based upon a ruling of the court in [4] sustaining an objection to the question asked of the defendant's witness Antone Dilger, as follows: "Did you have any conversation with Mr. Gibson in his lifetime, preceding the twenty-ninth day of September, 1920, concerning himself and his wife, May Gibson?" This question was objected to as incompetent, irrelevant, immaterial, as calling for hearsay and not within the issues of the case. The objection made was sustained. Following this question the counsel for defendant

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asked another question of the same import, and, upon objection, he was required to make an offer of proof. From the form of the question asked and the statement by counsel as to what he expected to prove, we believe the question was open to all of the objections made to it, and the court did not err in sustaining the objection.

By assignment No. 8 the appellant "contends that the ver-
[5] dict is contrary to the evidence in the case." Mrs. Gibson, called as a witness on the part of the state, testified, in substance: That she and her husband, Hugh J. Gibson, the deceased, formerly resided at No. 12 Porphyry Street, in the city of Butte, Montana, and about three years prior to September 29, 1920, they moved to No. 2537 Harvard Avenue, outside the city limits. The defendant had frequently visited their home, both before and after they moved to Harvard Avenue; he had often given her money as presents or loans; she had forbidden him coming to her house, and had after that time accepted money or presents from him. Mr. Gibson was employed at a mine; carried his lunch with him, returning home in the evening. On September 29, 1920, witness left her house about noon and went to Butte. Before leaving she locked the door. The windows of the house were closed and the shades pulled about halfway down. On returning home at 4:45 P. M., she noticed that the window-shades had been pulled clear down and a window had been broken. Entering the house, she discovered that someone had been in there, and had left a rope on the dining-room floor and a butcher-knife on a chair. The knife had been taken from her cupboard. About three minutes after entering the house she saw defendant standing in the kitchen doorway, and said, "My God! What are you doing here?" In reply defendant said, "I have come to kill the two of you," and drew a gun on her. She left the room, and he followed and demanded that she "take that off," and immediately caught her by the neck, took her into the bedroom, threw her on the bed, and choked her. She got loose from him and went into the

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kitchen. Defendant took Gibson's pistol from under the pillow on the bed, put it in his pocket, and followed witness into the kitchen, again caught her by the neck, choking her, and scuffling with her. In a few minutes she saw Mr. Gibson coming and said, "Here comes Hughie." Defendant stepped back into the bedroom doorway. Witness opened the outside kitchen door and her husband stepped in. Defendant, holding a gun in his hand, said to Gibson, "Hands up! I have come to tell you about your wife." Gibson said, "Put your gun down and I will talk to you." Thereupon Gibson set his lunch bucket on the table and defendant fired at him. Gibson stepped out through the back door followed by defendant. The men clinched. Witness ran out of the house, saw the men struggling, heard three other shots fired, saw her husband fall, and saw defendant fire two shots at him after he had fallen. She then ran down the alley, followed by defendant, who fired at her, hitting her in the hip, and causing her to fall. While she was lying on the ground, defendant fired two more shots at her, and missed. Defendant then passed on. The witness further testified that Mr. Gibson died that same evening as a result of the wounds inflicted on him by the defendant, and this portion of her testimony is corroborated by the testimony of the attending physicians, Drs. Kane, Lilly and McCarthy.

The testimony of Mrs. Gibson as to what occurred after the men passed out of the door is corroborated in many substantial particulars by the witnesses Mrs. Bridget Scott and Elmer Cabbage, who were eye-witnesses to a part of the occurrences which took place at that time. About two hours after the shooting of Mr. Gibson, the defendant appeared at the store of Mr. Assad, situated at 3106 Floral Avenue, Butte, seemed to be in a hurry, and asked if he could borrow Assad's "army pants." He was told to go in the house and get them, which he did, putting them on. He then appeared again at the store, bought two loaves of bread, and left, saying that he was going on a fishing trip. Between 9

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and 10 o'clock that evening the defendant was apprehended and arrested by the officers about four miles east of the city of Butte, on the Northern Pacific Railroad track. At the time of his arrest he had on an army uniform; had with him two loaves of bread, and a 32-caliber automatic pistol. He did not have any fishing tackle with him. Defendant, when searched, was asked if he had any other gun, and replied that he had had another gun, but had thrown it over the bank, and stated that it was the gun he got under the pillow in Gibson's house, and that it was Gibson's gun.

This evidence, introduced by the state, is sufficient to sustain a verdict of guilty, unless the evidence on behalf of the defendant is so overwhelming as to practically destroy the evidentiary value of the state's evidence. The witnesses called by the defendant gave evidence as to the social relationship between Mrs. Gibson and the defendant and as to presents made by defendant to her, and as to fragmentary parts of the conflict between the deceased and the defendant, as to alleged contradictory statements made by Mrs. Gibson, and alleged statements made by deceased after he was shot. The defendant himself, appearing as a witness in his own behalf, testified that he was at the Gibson residence on the evening in question, but that he went there upon the invitation of both the deceased and Mrs. Gibson, for the purpose of making some financial settlements with them, reaching the house a few minutes before the deceased appeared; that he did not assault Mrs. Gibson; that when the deceased appeared in the door he called the defendant a vile name; that Mrs. Gibson then handed the deceased a pistol, and that the defendant, in his own necessary self-defense, attacked the deceased and endeavored to take the pistol from him; that in the struggle that ensued, both within the house and after they had passed to the outside, the pistol was discharged. The defendant admits that he pursued and shot Mrs. Gibson. The evidence offered on the part of defendant is not of an overwhelming character; in fact, it is of such a character that the court would have

been justified in submitting the case to the jury, had the prosecution offered the evidence given by the defendant and his witnesses as the state's evidence and none other had been offered.

Defendant's specifications of error 9 and 10 are general in character; the former alleging error in overruling the defendant's motion for new trial, and the latter alleging an abuse of discretion in refusing to grant a new trial.

We have not been able to find any substantial error, which the defendant was in any manner deprived of his right to a fair and impartial trial, and therefore recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

Rehearing denied December 24, 1921.

STATE EX REL. WEISZ, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,943.)

(Submitted October 26, 1921. Decided November 28, 1921.)

[202 Pac. 387.]

*Aliens — Naturalization — District Courts — Jurisdiction —
Discretion—Unauthorized Judgment—Certiorari.*

Aliens—Naturalization—Judicial Proceeding—District Courts—Jurisdiction.

1. The district courts of Montana possess concurrent jurisdiction with the federal courts (within the limitations prescribed by Act of Congress relating to the subject) to naturalize aliens, and therefore when such power is exercised by them, the proceeding is a judicial and not a political one, and hence the supreme court may, on *certiorari*, review a judgment rendered in such a proceeding.

1. On the question of jurisdiction of state courts over naturalization proceedings, see notes in *Ann. Cas.* 1915C, 428; 30 *L. R. A.* 761; 48 *L. R. A.* 36.

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Same—Naturalization—Refusal—When Proper—Discretion.

2. It is within the discretion of courts to refuse to admit an alien to citizenship who affirms that he will not bear arms in defense of the government.

Same—Judgment Forever Denying Citizenship Unauthorized.

3. Held, on *certiorari*, that a judgment of the district court forever debarring an applicant for naturalization from citizenship is not authorized by the Act of Congress establishing rules for the naturalization of aliens (34 Stats. at Large, 596), and was therefore in excess of its jurisdiction.

Same—Naturalization—Appeal Does not Lie.

4. An appeal does not lie in this state from a judgment in naturalization proceedings.

Certiorari—Writ Lies, When.

5. *Certiorari* lies when jurisdiction has been exceeded and there is no appeal or other plain, speedy and adequate remedy.

Original application for Writ of *Certiorari* by the State, on the relation of Emanuel Weisz, against the District Court of the Sixteenth Judicial District of Montana for the County of Garfield and the Judges thereof. Judgment modified.

Mr. P. F. Leonard, for Relator, submitted a brief and argued the cause orally.

Has this court jurisdiction? The naturalization law (Act of June 29, 1906) makes no provision for an appeal from the judgment of the court on the application for citizenship. In *State ex rel. Gorelick v. Superior Court, Kings Co., Wash.*, 75 Wash. 239, Ann. Cas. 1915C, 425, 134 Pac. 916, the court followed *United States v. Dolla*, 177 Fed. 101, 21 Ann. Cas. 665, 100 C. C. A: 521, and held that there was no appeal from the judgment. The conflict as to the Act and the application thereof were mainly due to conditions existing prior to the Act of June 29, 1906. The said Act and recent decisions have settled the apparent conflict. In *Holmgren v. United States*, 217 U. S. 509, 19 Ann. Cas. 778, 54 L. Ed. 861, 30 Sup. Ct. Rep. 588 [see, also, Rose's U. S. Notes], it was held that Congress in the exercise of its constitutional authority could confer jurisdiction upon the state courts as to naturalization proceedings. This jurisdiction the court says has existed since 1790, since the first naturalization law. Congress does not confer any more jurisdiction on the federal courts than on the

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state courts under the Act in question. There is no conflict as to their jurisdiction as they have concurrent jurisdiction each independent of the other. (See 15 C. J. 1152.) It is undoubtedly true that if a right or privilege granted by the naturalization law and claimed by the relator should be denied him by the supreme court of the state of Montana, a writ of error would lie to the supreme court of the United States under section 237 of the Federal Judicial Code. But such jurisdiction would be no different in a naturalization proceeding than in any other case or proceedings involving the constitution or laws of the United States.

Mr. John L. Slattery, United States District Attorney, *Mr. Ronal Higgins* and *Mr. W. H. Meigs*, Assistant United States District Attorneys, for Respondents, submitted a brief; *Mr. Higgins* argued the cause orally.

The government contends that the supreme court of Montana has no jurisdiction in naturalization. Exclusive authority in naturalization is conferred upon Congress. (Art. I, sec. 8, U. S. Const.) In the exercise of that exclusive authority, Congress has regulated naturalization. (Secs. 4351-4384, U. S. Comp. Stats. 1916, and amendatory Acts in 1919 Supp. Comp. Stats.; 34 Stat. 596.) The matter of jurisdiction is governed by section 4351, Compiled Statutes (34 Stat. 596), as applying to state courts (sec. 4351.)

The supreme court does not exercise original jurisdiction in naturalization. (Const., Art. VIII, sec. 2; *Ex parte McKenzie*, 51 S. C. 244, 28 S. E. 468; *Ex parte Knowles*, 5 Cal. 300.) Nor does the supreme court have appellate jurisdiction, as is evident from the powers granted it by the Constitution of Montana, let alone from the federal and state authorities to be cited. The authority of state courts to naturalize aliens, as well as that of federal courts, emanates from Congress. All are, for the purpose of the naturalization statutes, federal courts. (*United States v. Aakervik*, 180 Fed. 137; *Inhabitants of County of Hampden v. Morris*, 207 Mass. 167, Ann. Cas.

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1912A, 815, 93 N. E. 579; *State ex rel. Gorelick v. Superior Court*, 75 Wash. 239, Ann. Cas. 1915C, 425, 134 Pac. 916; *Eldredge v. Salt Lake County*, 37 Utah, 188, 106 Pac. 939; *Matter of Christern*, 56 How. Pr. 5, 43 N. Y. Super. Ct. 523.)

Naturalization is a privilege and not a right. (*In re Buntaro Kumagai*, 163 Fed. 922.) It is to be granted upon the terms and conditions and by the methods provided by Congress. Congress has given to certain state and federal courts the discretionary power to grant or reject the petition of an alien for naturalization, and the orders of such courts made upon such petition are not subject to review by appeal or writ of error or at all. (*State ex rel. Gorelick v. Superior Court*, 75 Wash. 239, Ann. Cas. 1915C, 425, 134 Pac. 916.)

From the case last cited it may be deduced that the supreme court of Montana has no jurisdiction to compel action by a district court sitting as a naturalization tribunal, and it naturally follows further that if this court cannot compel, it cannot curb or modify action taken by a district court, exercised in naturalization by virtue of authority granted by Congress. (See, also, *Eldredge v. Salt Lake County*, 37 Utah, 188, 106 Pac. 939; *In re Goodman*, 178 N. Y. Supp. 499.) Until the decision in the case of *United States v. Dolla* (1910), 177 Fed. 101, 21 Ann. Cas. 665, 100 C. C. A. 521, taken up on a writ of error by the United States, the right of review in naturalization cases by an appellate court was never seriously questioned. The holding in this case, which is a leading one, was that the action of the lower court having jurisdiction to naturalize aliens, is not subject to review by writ of error or otherwise to the circuit court of appeals, because the naturalization law of 1906 provides no method of review by higher courts; nor do naturalization matters come within the purview of sections 5 and 6 of the Circuit Court of Appeals Act, the word "case" in section 6 of the Act not meaning a naturalization hearing. It was further held that the naturalization of an alien is a political and not a judicial act; that the power to naturalize could have been conferred by

Congress on some other agency than a court, the Department of Labor, for example.

The only method provided for attacking the findings of a court in naturalization is provided by section 4374, Compiled Statutes of 1916 (34 Stat. 601), and then only on the part of the government by suit to cancel on the grounds of fraud or illegality. This single method was supplied designedly by Congress, and the section of the bill before that body providing for an appeal from the decisions of lower courts was intentionally stricken. (40 Cong. Rec., pp. 7784-7787. See, also, Report of Special Commission on Immigration appointed by the President March 1, 1905 [59th Cong., 1st Sess., Dec. 46, p. 26].) Congress in the naturalization statute of 1906 was correcting the evils resulting from a too easy acquisition of American citizenship. Yet in certain instances, even the government is foreclosed by the decision of a state court acting as a court of naturalization. (*United States v. Ness*, 245 U. S. 319, 62 L. Ed. 321, 38 Sup. Ct. Rep. 118.) This latter case is the final word upon the question as to the lack of jurisdiction in this court to issue a writ of review to a district court sitting as a court of naturalization.

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

Original application for *certiorari*. At the hearing on relator's petition for admission as a citizen of the United States, the district court, after finding "that petitioner will not bear arms in defense of the United States," made and entered the following judgment: "Said petition is hereby denied with prejudice, and [petitioner is] forever debarred from citizenship and declaration held invalid."

The claim made by the relator is that the district court exceeded its jurisdiction in including in the judgment the phrase "forever debarred from citizenship." A writ of review was issued by this court commanding the district court to certify and send to this court a transcript of the record and

proceedings had at the hearing on relator's petition to become a citizen. The respondents appeared and moved to quash the writ so issued upon the grounds that this court has no jurisdiction of the subject matter; that a district court sitting as a naturalization court acts through courtesy and assumes the same status as a federal court in naturalization matters; that the admission of an alien to citizenship is a political, not a judicial act; that no right of relator has been violated; that the petition does not state facts sufficient to entitle the relator to any relief.

The objections made by respondents in their motion to quash [1] all have reference to the jurisdiction of this court. Congress alone has power to establish rules for naturalization (Art. I, sec. 8, U. S. Const.), but the Congress has from the very beginning conferred authority upon state courts to hear and finally determine applications for citizenship. The present law is contained in the Act of June 29, 1906 (34 Stats. at Large, 596). As early as 1792 the United States supreme court said: "State courts possess concurrent authority with federal courts to naturalize aliens, but such authority of the state court cannot be exercised so as to contravene the Acts of Congress." (*Collet v. Collet*, 2 Dall. (U. S.) 294, 1 L. Ed. 387; see 2 Cyc. 111; *Holmgren v. United States*, 217 U. S. 509, 516, 19 Ann. Cas. 778, 54 L. Ed. 861, 30 Sup. Ct. Rep. 588 [see, also, Rose's U. S. Notes]; 6 Fed. Ann. Stats. 938.)

“The power to naturalize an alien is a judicial power; consequently proceedings for naturalization are judicial proceedings to be exercised by the courts.” (2 Cyc. 113.) The power is tendered by Congress. The consent of the state to accept and act on that power is conferred on the state courts by the state Constitution. (Sec. 11, Art. VIII, Mont. Const.) The authority to naturalize is thus by the Act of Congress brought within the jurisdiction of the state court, and the judgment rendered is that of a state court acting within the limits of the authority conferred by Congress and accepted by the state. And when this power is exercised by a state court it is a

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judicial proceeding. It is not the report of a federal agent nor the conclusion of a magistrate. This judgment is recognized by the federal authority as *res adjudicata* and final. (*United States v. Gleason* (C. C.), 78 Fed. 396, 6 Fed. Ann. Stats. 938 *et seq.*)

In a naturalization proceeding the question presented to the court is contained in the petition *then* before the court, not in some other petition thereafter to be filed or tendered for filing. It is a statutory proceeding, and the court cannot go beyond the statute. "An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications. Their duty is rigidly to enforce the legislative will in respect to a matter so vital to the public welfare." (*United States v. Ginsberg*, 243 U. S. 472, 61 L. Ed. 853, 37 Sup. Ct. Rep. 422.)

A court is certainly not transcending its discretionary power [2] when it refuses to admit to citizenship an alien who affirms that he will not support the government, and this would apply to any petition filed if the same conditions existed.

The phrase "with prejudice" appearing in the judgment can [3] only mean that the judgment is final as to the petition then before the court. But the phrase "forever debarred from citizenship" is not authorized by the Act of Congress. The question as to whether the relator has the right under the federal law to file another petition is not involved in this hearing. Federal courts have considered that question. (6 Fed. Ann. Stats. 938 *et seq.*; *In re Centi* (D. C.), 217 Fed. 833; *In re Guliana* (D. C.), 156 Fed. 420.) If this statute does not deny to the petitioner the right to file another petition in the future, the court cannot deprive him of that right or prejudice the petition when filed or tendered for filing. And if no such right is now given, it is within the power of Congress to enact a statute which does give it. This judgment on its face is a perpetual bar to the exercise of any such right, and in effect a denial of the power of Congress, and to that extent the phrase

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complained of in the judgment is not authorized by the Act of Congress. This is sufficient to call into requisition the action of this court if it has jurisdiction to act at all with reference to judgments in this class of cases.

The relator does not take issue with the judgment of the district court, in so far as it denies his application to become a citizen, but admits the legal discretionary power of the court to approve or deny his application. The judgment denying the application stands. The objection is directed solely to that part of the judgment which forecloses the future to him.

[4] Whatever may be the rule in other jurisdictions, there is not any appeal from judgments in naturalization proceedings in this state. And that is the rule announced in other states having similar statutes. (*State ex rel. Gorelich v. Superior Court, Kings County, Wash.*, 75 Wash. 239, Ann. Cas. 1915C, 425, 134 Pac. 916. See, also, *United States v. Dolla*, 177 Fed. 101, 21 Ann. Cas. 665, 100 C. C. A. 521.) However, the supreme court of Illinois did entertain an appeal by the government, and reversed a judgment admitting an alien to citizenship. (*United States v. Hrasky*, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279, 88 N. E. 1031.)

We then have a final judgment rendered by a state court, sitting under authority of the state Constitution, acting in a case brought before it and within its jurisdiction by Act of Congress, containing a command not necessary to the determination of the issue then before the court, and not authorized by any law, state or federal, and clearly in excess of its jurisdiction. It is certainly not within the meaning of the Act of Congress that a court may prescribe additional qualifications to become a citizen of the United States or to foreclose any subsequent legislation by Congress, either prescribing additional qualifications or omitting those now existing.

It has been held by this court that *certiorari* will not lie, [5] unless it appears that jurisdiction has been exceeded, that there is no right of appeal, and that there is no other plain, speedy, and adequate remedy. (*State ex rel. Weinstein*

Co. v. District Court, 28 Mont. 445, 72 Pac. 867.) All these requisites are present in the instant case. The provisions of the state Constitution and of the statute which clearly confer power upon this court to grant relief in cases of this kind are so clearly and exhaustively analyzed and discussed in *Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517, that further comment is unnecessary.

We recommend that the judgment complained of be modified by striking out the clause complained of, namely, "forever debarred from citizenship."

PER CURIAM: For the reasons given in the foregoing opinion, it is ordered that the judgment complained of be modified by striking out the clause complained of, namely, "forever debarred from citizenship."

Modified.

MONTANA AUTO & GARAGE CO., APPELLANT, v.
KEARNEY, RESPONDENT.

(No. 4,572.)

(Submitted October 28, 1921. Decided November 28, 1921.)

[202 Pac. 578.]

Automobiles—Repairs—Storage—Counterclaim—Evidence—Insufficiency—Nonsuit—Record on Appeal—Instructions.

Appeal and Error—Nonsuit—Record on Appeal—Bill of Exceptions.

1. Where a motion for nonsuit and the grounds therefor were not incorporated in the bill of exceptions or the judgment-roll, except as shown in copies of journal entries improperly in the judgment-roll, alleged error in sustaining the motion is not reviewable on appeal.

Automobiles — Repairs — Storage — Counterclaims — Personal Injuries — Negligence—Causal Connection—Evidence—Insufficiency.

2. In an action by the owner of a garage to recover for repairs on and storage of an automobile, where defendant's counterclaims based on damages to the automobile because of negligent repairs and consequent personal injuries to himself were not supported by his evidence showing negligence or a causal connection between

it and the personal injuries, he was not entitled to recover on either.

Same—Counterclaims—Verdict—Insufficiency of Evidence.

3. Evidence *held* insufficient to support a verdict for \$1,200 on defendant's counterclaims, the record disclosing an entire failure of proof as to one, and sufficient to support a claim for \$20 only.

Trial—Instructions—Inapplicability to Facts—Error.

4. An instruction based on a counterclaim wholly unsupported by the evidence was inapplicable to the facts and therefore erroneous.

Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

ACTION by the Montana Auto & Garage Company against James Kearney. From judgment for defendant, plaintiff appeals. Reversed.

Messrs. Walker & Walker and *Mr. C. S. Wagner*, for Appellant, submitted a brief; *Mr. Thos. J. Walker* argued the cause orally.

Mr. Ed. Fitzpatrick and *Messrs. Canning & Geagan*, for Respondent, submitted a brief; *Mr. Fitzpatrick* argued the cause orally.

MR. COMMISSIONER SPENCER prepared the opinion for the court.

This is an action for the recovery of \$348 and interest, as set forth in four causes of action in the amended complaint, as follows: First, for goods, wares and merchandise sold and delivered, of the reasonable value of \$220.50; second, work and labor performed reasonably worth \$55.35; third, work, labor, and services in bringing defendant's wrecked automobile to plaintiff's garage, reasonably worth \$20; and, fourth, storing defendant's automobile in plaintiff's garage, reasonably valued at \$52.50. The answer tenders a general denial of the first three causes of action, admits the fourth, and sets up four separate counterclaims against the plaintiff, in substance following: First, negligent repair of front and rear wheels on the right side of defendant's automobile, by reason of which, on Novem-

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ber 10, 1917, these wheels gave way and broke, without fault of defendant, causing the automobile to become strained and twisted, to defendant's damage in the sum of \$600; second, founded upon the same negligence alleged in the first counterclaim, it is claimed the defendant suffered personal injuries by reason of being thrown from his automobile to his damage in the sum of \$5,000; third, that by reason of the negligence of plaintiff, its agents and servants, certain automobile accessories, consisting of two robes, two tires, four inner tubes, one set of chains, one wire cable, and fifty feet of rope in storage with defendant's automobile in plaintiff's garage between August 1, 1917, and January 5, 1918, were removed or taken and became wholly lost to defendant, to his damage \$158; and fourth, that plaintiff negligently allowed its servant to use defendant's automobile during the month of August, 1917, while in storage with plaintiff, and by reason of the rough and negligent use thereof by plaintiff's servant the headlights were wholly destroyed, to defendant's damage in the sum of \$50. The reply put in issue all of the affirmative defenses. Trial was had before a jury, resulting in a verdict and judgment in favor of defendant for \$1,200. Plaintiff's motion for a new trial was overruled, and appeal is from the order overruling the motion and from the judgment.

Appellant assigns as error: (1) The order of the court [1] sustaining a motion for nonsuit upon plaintiff's first three causes of action; (2) giving instruction No. 8 (hereinafter set out at length); (3) insufficiency of the evidence to justify the verdict, and that the verdict is against law; and (4) in overruling plaintiff's motion for a new trial. It is sufficient to say of the first that the motion and the grounds therefor appear neither in the bill of exceptions nor in the judgment-roll, except as shown in copies of journal entries of the clerk improperly inserted in, and not properly a part of, the judgment-roll, which disclose that "defendant moved the court for an order striking certain testimony and nonsuiting plaintiff as to certain causes of action," which motion was by the court

granted, and the further reference thereto in instruction No. 10 that "the court instructs the jury that the only claim of the plaintiff before you is its claim for the sum of \$52.50," and hence this assignment is not before us for determination. The other three may be decided by a discussion involving the sufficiency of the evidence to justify the verdict. The first and second counterclaims both being founded upon the alleged negligent repair of two wheels of defendant's automobile, as a result of which the wheels broke down, causing certain damage to the automobile and personal injuries to the defendant, merit no consideration further than to say that each is entirely without support in the evidence either as to any negligence as alleged or causal connection between such negligence and resulting damage as charged. (*Lyon v. Chicago etc. Ry. Co.*, 50 Mont. 532, 148 Pac. 386; *Wallace v. Chicago etc. Ry. Co.*, 48 Mont. 427, 434, 138 Pac. 499.)

Passing to a discussion of the evidence in support of the [2] third and fourth counterclaims, and viewed in a light most favorable to the defendant, it is quite unsatisfactory; barely sufficient to carry the issues to the jury, and wholly insufficient to support the verdict. Defendant's third counterclaim demands \$158 as the reasonable value of two robes, two tires, four inner tubes, one set of chains, one wire cable, and fifty feet of rope, claimed to have been lost through negligence of the plaintiff, while in storage with it. The defendant, notwithstanding he claims but \$158 for the loss of specified articles, testified in general terms that "the value of these tools and equipment that I had in the car was about a couple of hundred dollars, something around there," and, particularizing his valuations, says: "There was two extra tires behind that car, one that had been used some, and one that was never put on the road at all. As to the market value of those tires, I think I know what I paid for them; I think it was \$65 I paid for these Firestone tires; I bought them from the Montana Auto & Garage Company. That cable rope was a three-eighths cable, and I had it all fixed on both ends, and it might have been

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worth about \$20. * * * I had two extra tires all the time behind; I purchased one when we were going out to the coal camp, a Firestone tire; that was about September, I guess—I think it was the last of August we went out. I think it was \$65 I paid for that tire; I don't know whether they give me ten per cent off or not; I think it was \$65 or something like that. Referring to slip No. 5062, plaintiff's exhibit 10, the slip there says that that tire cost me \$54.20; I was to get ten per cent off. * * * That is my signature on that slip, and it states that I purchased a tire for \$45 on the 4th of September; so that I guess I was in town that day. * * * The slip which you show me bears my signature, and it states that I bought a tire for \$26.60 on the 22d of September. * * * As to this wire cable, I got it made up at the Black Rock mine by the ropeman, and I paid him \$20 for it."

And, in support of his fourth counterclaim for \$50 for destruction of the headlights on his automobile, he testified: "Those two front lights would be worth about \$20; I think about \$20 the way he had them broke up; the glass was broken and the frame was mashed right in. * * * I spoke of two headlights that Connors damaged; he broke them, that was all; they were broke when he came in; the glass was broke and the inside of them, the globes. I should judge that those lights were worth about \$20." The foregoing is all of the evidence as to the reasonable value of property claimed to have been [3] lost and damaged. Thus it will be seen that, when defendant placed a valuation of "a couple of hundred dollars" upon tools and equipment in his car while in storage with the plaintiff, that sum includes valuation of articles (unidentified tools and equipment) which are not included in the list of articles claimed to have been lost, and is no basis whatever by which a reasonable value could be placed upon the articles specifically enumerated in his third counterclaim. Such being the condition of the record, we find a total failure of proof of the valuation of any of the articles enumerated in the third counterclaim, save and except the quotations above showing the

cost price of three tires and the wire cable, the loss of which two of the three tires purchased is undisclosed. The evidence, in fact all of the evidence in support of the fourth counterclaim, is that the damage to the headlights (if damaged at all, and which is disputed by plaintiff) was \$20, which is sufficient upon which to base a recovery, if at all, for that sum, and none other. Hence it is obvious that the verdict of \$1,200 in favor of defendant "upon counterclaims stated in the answer" is wholly unwarranted by the proof, and cannot be sustained.

Sufficient objection was made to the giving of instruction No. 8, which reads as follows:

"The court instructs the jury that if you find for the [4] defendant you will assess his damages at such a sum of money as in your opinion will be reasonable and a just compensation for the injuries he has sustained. In estimating the damages you will take into consideration the physical and mental pain and suffering, if any, he has sustained or endured on account of being thrown from the automobile; also for the pain which he may be likely, or that there is a reasonable probability, that defendant will endure in the future." This instruction was given upon the theory that recovery was authorized under defendant's second counterclaim, but the foregoing observations in this opinion are sufficient to indicate that it is wholly inapplicable to any facts disclosed by the evidence, and further consideration thereof is unnecessary.

For some reason of which we are not advised, plaintiff's first three causes of action were withdrawn from the consideration of the jury. The record before us suggests that nonsuit was granted, but its condition precludes us from deciding whether or not the action of the court in this regard was erroneous as claimed in appellant's brief. It is to be observed, however, that the bill of exceptions contains all of the evidence offered and submitted by plaintiff to prove its case, as well as defendant's motion to strike it out, which was denied by the court, and we are at a loss to see any possible

theory upon which plaintiff could properly be denied the right to have its evidence passed upon by the jury. (*Smith v. Sullivan*, 58 Mont. 77, 190 Pac. 288; *Gallatin Valley Farmers' Alliance v. Flannery*, 59 Mont. 534, 197 Pac. 996.)

For the reasons herein expressed, we recommend that this cause be reversed, and remanded to the district court of the second judicial district, with directions to dismiss the first and second counterclaims and grant a new trial upon plaintiff's fourth cause of action and the third and fourth counterclaims of defendant's answer.

PER CURIAM: For the reasons given in the foregoing opinion, the cause is reversed, and remanded to the district court of the second judicial district, with directions to dismiss the first and second counterclaims and grant a new trial upon plaintiff's fourth cause of action and the third and fourth counterclaims of defendant's answer.

Reversed.

SMITH, RESPONDENT, v. FRANKLIN FIRE INSURANCE
CO., APPELLANT.

(No. 4,525.)

(Submitted November 1, 1921. Decided December 5, 1921.)

[202 Pac. 751.]

*Fire Insurance—Notice, Proof and Ascertainment of Loss—
Complaint—Performance—Statutory Allegation—Pleading
and Practice—Default—Motion to Set Aside—General Ap-
pearance—Defective Summons—Waiver.*

Pleading and Practice—Motion to Set Aside Default—Defective Summons
—General Appearance—Waiver of Defect.

1. A motion to set aside a default judgment constitutes a general appearance and waives any defect or irregularity in the service of summons.

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Fire Insurance—Notice of Loss—Complaint—Inferences—Sufficiency.

2. In an action on a fire insurance policy which among other things provided that loss should not become payable until sixty days after notice of loss had been received by defendant company, failure of the complaint to allege directly that sixty days had elapsed after service of notice and before commencement of action did not render the pleading insufficient where, by reference to the record, it appeared affirmatively that the complaint was filed sixty-five days after service of notice.

Same—Notice and Proof of Loss—Conditions Precedent to Recovery.

3. While proof of loss required by a fire insurance policy to be given sixty days before the loss shall become payable may, under certain circumstances, serve the purpose of notice of loss also required, mere notice does not ordinarily supply the place of formal proof, the performance of each of the acts being a condition precedent to the right of the insured to recover in the absence of waiver.

Same—Liability—Lapse of Sixty Days After Proof of Loss—Complaint.

4. The complaint in an action on a fire insurance policy must allege affirmatively that the sixty-day period provided for therein before the loss became payable had expired before commencement of the action.

Same—Conditions Precedent—Performance—General Statutory Allegation of Performance Insufficient.

5. The lapse of sixty days mentioned above, not being a condition precedent which plaintiff could perform before commencing suit, her general allegation, permissible under section 6572, Revised Codes, that she had performed all conditions precedent to be performed by her under the contract, did not supply the necessary allegation that the period had elapsed before filing complaint.

Same—Ascertainment of Loss—Complaint—Burden of Insurer.

6. *Semble*: It would seem that where a fire insurance policy provides that loss shall not become payable until sixty days after ascertainment or estimate of its amount by the insured and the insurance company, or, if they differ, by a board of appraisers, the burden of the disclosing that that time had not elapsed before commencement of action is upon defendant company and not upon insured.

Same—Ascertainment of Loss—Complaint—Allegation of Demand and Refusal Sufficient.

7. *Held*, that an allegation that plaintiff had demanded adjustment of her claim under a fire insurance policy but that insurer had refused to participate in an ascertainment of the loss was sufficient to meet the requirement that action should not be commenced until sixty days after ascertainment of the loss by one of the methods prescribed in the policy.

Appeals from District Court, Cascade County; H. H. Ewing, Judge.

ACTION by Daisey E. Smith against the Franklin Fire Insurance Company of Philadelphia, Pennsylvania. Judgment for

3. Furnishing proofs of loss within prescribed time as condition precedent to action on policy, see notes in 15 Ann. Cas. 335; Ann. Cas. 1912C, 604.

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the plaintiff upon defendant's default, and from the order overruling motion to vacate the judgment and to permit defendant to file an answer, defendant appeals. Reversed and remanded.

Messrs. Freeman & Thelen and *Mr. G. S. Frary*, for Appellant, submitted a brief; *Mr. Frary* argued the cause orally.

Where service of process is irregular a default entered against defendant and a judgment by default should be set aside without a showing of excusable neglect or inadvertence. (*Brown v. Gaston & Simpson etc. Min. Co.*, 1 Mont. 57, 63.) It is good grounds for vacating a default judgment that defendant had no notice of the action either because of a failure to serve him with process or because the process or service was fatally irregular or defective. And the rule includes cases where the defendant being a corporation, it was served on one not authorized to receive service. (23 Cyc. 914; *Norton v. Atchison etc. R. R. Co.*, 97 Cal. 388, 33 Am. St. Rep. 198, 30 Pac. 585, 32 Pac. 452; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053.)

The complaint is silent as to any allegation that proofs of loss were ever received by defendant or that sixty days have elapsed since the proofs of loss were served upon the defendant insurance company and the commencement of the action. In fact, there is no allegation that proofs of loss were ever served upon the said insurance company and the affidavits show no proofs of loss were ever served upon the insurance company. The complaint therefore states no cause of action against the defendant company. (*Clemens v. American Fire Ins. Co.*, 70 App. Div. 435, 75 N. Y. Supp. 484; 2 May on Insurance, 4th ed., 1313; *Wicecarver v. Mercantile Town Mut. Ins. Co.*, 137 Mo. App. 247, 117 S. W. 698; *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264; *Borger v. Connecticut Fire Ins. Co.*, 24 Cal. App. 696, 142 Pac. 115.)

Messrs. Speer & Lohrke, for Respondent, submitted a brief.

If one against whom a judgment has been rendered by default without a valid service of process appears and asks that the default shall be set aside and for leave to answer on the merits, he thereby waives the want of process. (*Crane v. Penny*, 2 Fed. 187; *Douglass v. Pacific Mail Steamship Co.*, 4 Cal. 304; *Gilchrist Transp. Co. v. Northern Grain Co.*, 107 Ill. App. 531; *Aherene v. Wakenney Land & Inv. Co.*, 82 Kan. 435, 108 Pac. 842; *Frear v. Heichart*, 34 Minn. 96, 24 N. W. 319; *Currey v. Trinity Zinc etc. Co.*, 157 Mo. App. 423, 139 S. W. 212; *Leake v. Gallogly*, 34 Neb. 857, 52 N. W. 824; *B. Crystal & Son v. Ohmer*, 79 Misc. Rep. 227, 139 N. Y. Supp. 841; *Dell School v. Peirce*, 163 N. C. 424, 79 S. E. 687.)

The appellant also makes the allegation that it does not appear that sixty days had expired after notice of loss, and that therefore at the time of the commencement of the action nothing was due on the policy sued upon, and cites a number of cases on this point. The complaint specifically alleges that notice of loss was served upon the defendant February 24, 1919, and our action was filed and commenced on April 30, 1919.

We submit that the words used by the plaintiff in her complaint herein can mean nothing less than that she fully and entirely performed all the conditions precedent required on her part to be performed, and that she did all this in the proper manner and at the proper time, and that such language is sufficient to satisfy the requirements of section 6572 of the Revised Codes.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover upon a policy of fire insurance. Summons was issued and served, but defendant failed to appear within the time allowed by law, and its default was entered and a judgment rendered in favor of the

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plaintiff for the amount claimed in the complaint. Thereafter the defendant moved the court to set aside the default, vacate the judgment, and permit the defendant to file an answer, which was tendered. The grounds of the motion were that service of the summons was irregular and defective, and that the complaint does not state facts sufficient to constitute a cause of action. The motion was denied and defendant appealed from the judgment and from the order denying its motion.

It is contended that the service of the summons was in-
[1] effectual for any purpose, in that the proper person was not served, but, however this may be, any defect or irregularity in the service was cured by filing the motion, which constituted a general appearance on the part of the defendant. (*Hinderager v. MacGinniss, ante*, p. 312, 202 Pac. 200.) Further discussion of this subject is unnecessary.

The policy in question contains many provisions, among which are the following: "If fire occur, the insured shall give
[2] immediate notice of any loss thereby in writing to this company * * * and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating [then follows an enumeration of the facts which are to be included in the statement], * * * the loss shall not become payable until sixty (60) days after notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by this company." The policy provides, also, that the ascertainment or estimate of the amount of the loss shall be made by the insured and the insurance company, or, if they differ, by a board of appraisers, for the creation of which provision is made.

A copy of the policy is attached to and made a part of the complaint, and it is insisted that the complaint fails to state a cause of action, in that it fails to allege that sixty days elapsed after notice and proof of loss were served upon the company, and after the amount of the loss was determined

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as provided in the policy, and before the action was commenced. In the complaint it is alleged that the fire occurred on February 3, 1919, and that on February 24 plaintiff caused notice of the loss to be served upon the defendant. This action was commenced on April 30, and to determine that fact reference may be made to the record which discloses when the complaint was filed (*Connecticut Mut. Life Ins. Co. v. McWhirter*, 73 Fed. 444, 19 C. C. A. 519), so that it does appear affirmatively that more than sixty days elapsed after the service of notice of loss and before the complaint was filed.

There is not any allegation in the complaint that proof of [3] loss—the verified statement mentioned above—was ever furnished at any time, or at all, or that the furnishing of the same was waived. Giving the notice and furnishing the proof are separate and distinct acts. The proof may, under certain circumstances, serve the purpose of notice, but a mere notice does not ordinarily supply the place of formal proof (26 C. J. 376), and however the two acts may be done, the performance of each is a condition precedent to the insured's right to recover in the absence of waiver. (*DaRin v. Casualty Co.*, 41 Mont. 175, 137 Am. St. Rep. 709, 27 L. R. A. (n. s.) 1164, 108 Pac. 649.) In order to avoid the force of the objection [4, 5] now under consideration, plaintiff relies upon the following allegation which appears in the complaint: "That the plaintiff has, at all times, done and performed all of the stipulations, conditions and agreements stated in said policy to be performed on her part at the time and in the manner therein specified." Section 6572 of the Revised Codes provides: "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the fact showing such performance." We think plaintiff complied substantially with the requirements of the statute (*Ivanhoff v. Teale*, 47 Mont. 115, 130 Pac. 972; *Enterprise*

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Sheet Metal Works v. Schendel, 55 Mont. 42, 173 Pac. 1059), and the complaint must be held to set forth sufficiently the fact that all conditions precedent to be performed by the insured alone had been duly performed (*Ackley v. Phenix Ins. Co.*, 25 Mont. 272, 64 Pac. 665).

But full performance of the conditions precedent mentioned in the policy did not give to plaintiff an immediate right of action. By the very terms of the policy, the amount of the loss did not become due until the lapse of sixty days after the proof of loss was submitted, and therefore the fact that such period elapsed before the complaint was filed must appear affirmatively. (*Sutton v. Lowry*, 39 Mont. 462, 104 Pac. 545; *German Ins. Co. v. Hall*, 1 Kan. App. 43, 41 Pac. 69; *First Nat. Bank v. Dakota F. & M. Co.*, 6 S. D. 424, 61 N. W. 439; 5 Joyce on Insurance, 2d ed., sec. 3677.)

The general rule is stated as follows: "If by the terms of the policy the loss is not payable until a specified time after loss occurs, or after notice and proof of loss, it is necessary to allege that this time has expired before the commencement of the action." (11 Ency. Pl. & Pr. 414.) The lapse of the sixty-day period is not a condition precedent which either party is required to or could perform. It merely fixes the time when the liability occasioned by the fire becomes enforceable for the first time, and for this reason the provisions of section 6572 above have no application here, and the fact that the designated period elapsed after proof of loss was furnished cannot be inferred from the general allegation above. (26 C. J. 496, *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264; *Cowan v. Phoenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408; *Clemens v. American Fire Ins. Co.*, 70 App. Div. 435, 75 N. Y. Supp. 484; *Carberry v. German Ins. Co.*, 51 Wis. 605, 8 N. W. 406.)

Counsel for appellant insist that it was incumbent upon the [6,7] plaintiff also to disclose by the complaint that sixty days before the action was commenced the amount of the loss had been ascertained by one of the methods mentioned in the policy. Notwithstanding the apparently plain terms to that

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effect, it would seem that such a construction of the policy is not admissible, for if it be adopted, then it would be within the power of the insurance company to postpone indefinitely plaintiff's right to apply to the courts for relief by refusing or failing to join in any effort to adjust the loss. Since the insurance company must join in ascertaining the amount of the loss, it would appear not unreasonable to hold that the burden is upon it to disclose that sixty days had not elapsed after the loss was ascertained, if such was the fact, and advantage was sought to be taken of the fact (*Randall v. Phoenix Ins. Co.*, 10 Mont. 362, 25 Pac. 960); but this is not material, for even under the authorities which seemingly sustain defendant's position an allegation that plaintiff demanded adjustment, and that the insurer refused to participate, is sufficient (26 C. J. 494). In the complaint before us there is an attempt, however crude it may be, to plead a demand by plaintiff and a refusal by defendant.

For the reason that plaintiff fails to disclose that sixty days had elapsed after proof of loss was furnished and before this action was commenced, the complaint does not state a cause of action, and will not support the judgment.

The judgment and order are reversed and the cause is remanded to the district court, with directions to set aside the judgment, vacate the default, and permit the defendant to answer within such time as the court may direct.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER AND GALEN concur.

GAY, RESPONDENT, v. LAVINA STATE BANK, APPELLANT.

(No. 4,500.)

(Submitted October 29, 1921. Decided December 5, 1921.)

[202 Pac. 753.]

*Hail Insurance—Insurance Broker—Failure to Procure Insurance—Liability for Loss—Appeal and Error—Theory of Case.**Appeal and Error—Theory of Case.*

1. The theory upon which a case was tried in the district court with the acquiescence of the parties is binding upon them on appeal.

Insurance—"Broker"—Definition.

2. An insurance broker, as distinguished from an insurance agent, is one who acts as a middleman between the assured and the insurer, and who solicits insurance from the public under no employment from any special company, and, upon securing an order, either places the insurance with a company selected by the assured, or, in the absence of such selection, with a company selected by the broker.

Same—Broker's Failure to Procure—Liability for Loss.

3. Where a bank acting as an insurance broker, negligently failed to forward a farmer's application for hail insurance to the insurer and plaintiff's crop was destroyed, it was liable to the extent of the loss which would have fallen upon the company had the insurance been effected as contemplated.

Appeals from District Court, Musselshell County; Geo. P. Jones, Judge.

ACTION by Charles L. Gay against Lavina State Bank. Judgment for plaintiff and defendant appeals from the judgment and from the order overruling its motion for a new trial. Affirmed.

Mr. V. D. Dusenbery, for Appellant, submitted a brief and argued the cause orally.

It is settled that the clerk or subagent of a local insurance agent, while conducting insurance business, is the agent of the insurance company, and his acts are just as binding on the company as though he were duly commissioned. (22 Cyc. 1427-1432; 14 R. C. L. 875; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77; *Steele v. Ger-*

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man Ins. Co., 93 Mich. 81, 18 L. R. A. 85, 53 N. W. 514; *Home Ins. Co. v. Strange* (Ind. App.), 123 N. E. 127.) Since defendant was the agent of the Hartford Fire Insurance Company in the insurance transaction, it follows that it could not become, at the same time, the agent of the plaintiff, for the proposition is well settled that a party cannot act as agent for both the insurer and the insured in the same transaction, without their knowledge and consent. (2 C. J. 712; 14 R. C. L. 876; *J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N. J. L. 674, 54 Atl. 458; *British-American Assur. Co. v. Cooper*, 6 Colo. App. 25, 40 Pac. 147; *Rockford Ins. Co. v. Winfield*, 57 Kan. 576, 47 Pac. 511; *Mooney v. Merriam*, 77 Kan. 305, 94 Pac. 263; *Ramspeck v. Pattillo*, 104 Ga. 772, 69 Am. St. Rep. 197, 42 L. R. A. 197, 30 S. E. 962.)

An insurance agent in taking applications for an insurance company and sending them in to be acted upon by the company, is the agent of the latter and not the insured. (*Pfiester v. Missouri State Life Ins. Co.*, 85 Kan. 97, 116 Pac. 245; *Blake v. Farmers' Mut. L. P. Fire Ins. Co.*, 194 Mich. 589, 161 N. W. 890; *Steele v. German Ins. Co.*, 93 Mich. 81, 18 L. R. A. 85, 53 N. W. 514.)

Since the defendant, in taking plaintiff's application for hail insurance, was agent for the Hartford Company, a disclosed principal, any agreement that was in fact made was the agreement of the company and not of the agent. (*Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho, 481, 174 Pac. 1009.)

This case must be carefully distinguished from several classes of cases of somewhat similar character, if confusion is to be avoided, and we respectfully call the court's attention to three of such classes. The first class is composed of cases holding that where the agent of the insurance company makes an agreement to insure plaintiff's property and then fails to do so, the company is liable on the agreement to insure. (*McCabe v. Aetna Ins. Co.*, 9 N. D. 19, 47 L. R. A. 641, 81 N. W. 426; *Campbell v. American Ins. Co.*, 73 Wis. 100, 40 N. W. 661.) Those

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cases are clearly distinguishable from the instant case because the question of dual agency is eliminated. In our case, if the plaintiff were seeking to recover from the Hartford Fire Insurance Company a very different question would be raised.

In the second place, there are a few cases holding that where an insurance agent agrees to procure insurance upon certain property, and through negligence the insurance is not effected, the company, or the agent, or both, are liable in tort. (*Duffie v. Bankers' Life Ins. Assn.*, 160 Iowa, 19, 46 L. R. A. (n. s.) 25, 139 N. W. 1087; *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho, 481, 174 Pac. 1009; *Boyer v. State Farmers' Mut. Hail Ins. Co.*, 86 Kan. 442, Ann. Cas. 1915A, 671, 40 L. R. A. (n. s.) 164, 121 Pac. 329.) We submit to the court that these cases are unsound in principle, for the reason that they unnecessarily confuse the principles of tort and contract. They involve a breach of contract and not the breach of a duty imposed by law. In *Wallace v. Hartford*, above, we submit that the dissenting opinion of Judge Rice is more convincing than the majority opinion, because more in accord with settled legal principles. But whether sound or unsound, these cases form no precedent here, because, as we have already pointed out, this case is based upon breach of contract and does not attempt to state a cause of action in tort. To constitute an action in tort, the complaint must have alleged that the defendant negligently failed to do some specific act, and that but for said negligence the property would have been insured and the loss averted. (*Duffie v. Bankers' Life Ins. Co.*, above.) In our case there is no allegation that except for some negligence the property would have been insured, and no showing made upon that point.

The third class is composed of those cases in which the defendant is an insurance broker, not representing any insurance company, or not disclosing his principal in the transaction. (*Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Criswell v. Riley*, 5 Ind. App. 496, 503, 30 N. E. 1101, 32 N. E. 814; *Rezac v. Zima*, 96 Kan. 752, Ann. Cas. 1918B, 1035, 153 Pac.

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500; *Russell v. O'Connor*, 120 Minn. 66, 139 N. W. 148.) It is apparent that in this class of cases the question of dual agency is eliminated, since either there is no principal, or he is not disclosed in the transaction. In the first case, unless the agent is bound, no one is bound, and in the second case, if the defendant was in fact acting for an undisclosed principal, either may be held liable on the well known principle of agency. But when plaintiff signed the application for insurance he knew that he was dealing with the Hartford Fire Insurance Company, and that the defendant was agent for the latter. Nothing is disclosed in the entire transaction which shows any intent on the part of either party that the defendant should be insurer or that it should become bound in any way in the insurance transaction. It is the responsibility of the companies and not of the agents that is the frequent subject of inquiry among applicants for insurance.

Messrs. Dillavou & Moore and *Mr. W. W. Mercer*, for Respondent, submitted a brief; *Mr. H. C. Moore* argued the cause orally.

It is clear that the plaintiff and defendant entered into a contractual relation. The plaintiff had a note at defendant's bank, and he also had an overdraft with the defendant bank. He relied on the promise of the defendant to act for him and to procure hail insurance on his crops. He gave the defendant his note for \$100, which the defendant accepted. The rule of law applying to such a case is stated in 22 Cyc. at page 1448. It was held in *Tanenbaum v. Rosenthal*, 44 N. Y. App. Div. 431, 60 N. Y. Supp. 1092, that an agent agreeing to procure insurance in specific companies, at specified rates, does not make a contract of insurance, but only a contract to procure insurance and such contract is valid. One of the latest and best expressions of the law holding the agent liable to his principal for failure to procure insurance is found in *Rezac v. Zima*, 96 Kan. 752, Ann. Cas. 1918B, 1035, 153 Pac. 500. Many cases can be found which hold that an agent is liable to his prin-

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cipal for his failure to procure insurance. They are found collated in the note in Ann. Cas. 1918B, at page 1038.

In an action against an agent to recover damages for a breach of contract to insure the principal's property, the measure of damages in case of the destruction of the property is the value thereof, up to the amount for which it was agreed that insurance should be procured. (*Morris v. Summerl*, 2 Wash. C. C. 203, 17 Fed. Cas. No. 9837; *Alabama Red Cedar Co. v. Tennessee Valley Bank*, 200 Ala. 622, 76 South. 980; *Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; note, Ann. Cas. 1918B, pp. 1040, 1041.)

MR. JUSTICE GALEN delivered the opinion of the court.

In this case it appears that the defendant at all of the times mentioned was a banking corporation organized under the laws of the state of Montana, conducting a banking business at Lavina, Montana. In connection with its business, it was engaged in the writing of hail insurance for the Hartford Fire Insurance Company of Hartford, Connecticut, and other companies, for the accommodation of customers. A. C. Bayers, who was vice-president of the defendant bank, was the local insurance agent of the Hartford Insurance Company at Lavina, but the insurance business was conducted by the bank, and the profits derived therefrom went to the bank, although done in the name of A. C. Bayers, agent. Applications for such insurance were received by any of the officers or agents of the bank, and this method of handling the business was known to and approved by the insurance company. The plaintiff, a farmer owning crops growing in the vicinity of Lavina, on June 1, 1918, visited the defendant bank, and there interviewed William Bargain, one of its bookkeepers, then in charge of the bank, concerning hail insurance covering such crops, and a small overdraft due the bank. Bargain accepted for the bank plaintiff's promissory note for the sum of \$20, to cover the plaintiff's

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overdraft, amounting to \$9.13, and credited the balance of the \$20 note to plaintiff's account. At plaintiff's request, Bargain filled out an application for hail insurance, and plaintiff signed the same, such application being made out upon the form provided by the Hartford Fire Insurance Company, and reciting in part as follows: That Charles L. Gay of Broadview postoffice, in the county of Yellowstone, state of Montana, makes application to the Hartford Fire Insurance Company of Hartford, Connecticut, for insurance upon growing crops, consisting of sixty-five acres of wheat at \$10 per acre, amount \$650, and thirty-five acres of alfalfa at not to exceed \$10 per acre, amount \$350, against damage by hail for the year 1918, to the amount of \$1,000, to be covered by such insurance from the date of the signing of the application to September 15, 1918, at noon, standard time; it being declared in the application that the total number of acres for which insurance was applied for was 100, that the applicant was a tenant of the land described, and that the application was made with specific reference to the "policy stipulations and agreements" attached to the application, and the statements and representations made in the application. The plaintiff executed his promissory note for \$100 covering the amount of the insurance premium, and delivered it to Bargain which note is dated at Lavina, Montana, June 1, 1918, payable November 1 after date, to the order of Lavina State Bank, Lavina, Montana. The plaintiff's crops were destroyed by hail on August 20, 1918, and this action was brought by the plaintiff on September 10, 1918, to recover the sum of \$1,000 damages on account of the loss of such crops. The action is for breach of contract due to defendant's failure to procure the policy of insurance applied for by the plaintiff.

In defense it was contended, and proof was introduced at the trial to show, that the application for the insurance and the promissory note covering the premium received were received and accepted upon the express understanding and condition that the transaction should meet with the approval of P. A.

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Teichroew, cashier of the bank, and that until such time the insurance would not be put in force; that upon the return of Mr. Teichroew to the bank a few days later he refused to accept the note unless it was secured, and that thereupon Mr. Bargain wrote a letter and mailed it to the plaintiff at Broadview, advising that security was required for the insurance premium note before his application would be accepted. Bargain testified that on August 20, 1918, after the destruction of plaintiff's crops by hail, the plaintiff talked with him at Lavina over long-distance telephone from Broadview, and admitted receiving Bargain's letter, but said he thought it could be fixed up later. The plaintiff denied that the note was given or accepted conditionally; denied receipt of the letter from Bargain; or any knowledge that the insurance was not in full force and effect until after the hail storm and telephonic communication had with the defendant bank. The premium note and application for the policy of hail insurance were returned to the plaintiff a day or two subsequent to the hail-storm, having been theretofore pigeon-holed in the bank.

The case was tried in the district court of Musselshell county, with a jury, and resulted in a verdict and judgment in plaintiff's favor for the sum of \$675. The appeal is from the judgment and order overruling defendant's motion for a new trial.

Several alleged errors are assigned as reason for reversal, but in our view but one question is necessary for consideration for complete disposition of the case, presented by motion for a directed verdict, and made defendant's first specification of error; that is, whether the defendant bank may be held in damages for its failure to procure for plaintiff a policy of insurance protecting him from loss or damage to his crops in consequence of hail. As to whether it was an executory or executed contract for insurance constituted a question of fact for the jury, and upon the controverted evidence the jury resolved the issue in favor of the plaintiff. We are bound by the jury's findings in this regard, so that we have before us the application for insurance and promissory note for premium,

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both executed by the plaintiff and accepted by the bank, and question arises as to the bank's liability to respond in damages for plaintiff's loss in consequence of the defendant's failure to secure the crop insurance applied for.

The complaint alleges that the contract for breach of which the damages are sought is one by which "the defendant undertook and agreed to *insure*" the growing crops described; but no contention was made by the defendant in its answer or at the trial that the contract was anything more than one [1] *to procure insurance* on plaintiff's crops. The trial proceeded throughout on the latter theory, evidence being admitted in support thereof without objection, and we will accept the same without further inquiry. The theory upon which a case was tried in the district court with the acquiescence of the parties is binding upon them here. (*Talbott v. Butte City W. Co.*, 29 Mont. 17, 73 Pac. 1111; *Hendrickson v. Wallace*, 29 Mont. 504, 75 Pac. 355; *Mares v. Dillon*, 30 Mont. 117, 75 Pac. 963; *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775; *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *Nilson v. City of Kalispell*, 47 Mont. 416, 132 Pac. 1133; *Farwell v. Farwell*, 47 Mont. 574, Ann. Cas. 1915C, 78, 133 Pac. 958; *Wallace v. Weaver*, 47 Mont. 437, 133 Pac. 1099; *Mosher v. Sutton's N. T. Co.*, 48 Mont. 137, 137 Pac. 534; *Roberts v. Sinnott*, 55 Mont. 369, 177 Pac. 252; *Babcock v. Engel*, 58 Mont. 597, 194 Pac. 137; *Hoskins v. Scottish U. & N. Ins. Co.*, 59 Mont. 50, 195 Pac. 837.) No question was raised by the pleadings or otherwise as to whether the contract of the defendant bank was *ultra vires*, so that subject is passed without consideration, and no opinion is expressed thereon.

The action is one founded on contract rather than tort, and [2, 3] from the facts stated, it appears that the defendant bank was acting as an insurance broker rather than as an insurance agent. It was applied to by the plaintiff for hail insurance, and it accepted and received an application for such insurance with the Hartford Fire Insurance Company,

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whose agent at Lavina was A. C. Bayers, vice-president of the defendant bank. It was in position to accept and receive applications for hail insurance with other companies, but as no company was specially designated by the plaintiff, his application was by the defendant bank made to the Hartford Fire Insurance Company. This clearly brings the defendant within the definition of an insurance broker, as follows: "An insurance broker is one who acts as a middleman between the assured and the insurer, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he either places the insurance with a company selected by the assured, or, in the absence of any selection by him, then with a company selected by such broker." (14 R. C. L. 868; 9 C. J. 509.)

Every broker is in a sense an agent, but every agent is not a broker. The chief feature which distinguishes a broker from other classes of agents is that he is an intermediary, or middleman, and, in accepting applications for insurance, acts in a certain sense as the agent of both parties to the transaction. Another distinction is that the idea of exclusiveness enters into an employment of agency, while in respect to a broker there is a holding out of oneself generally for employment in securing insurance. (9 C. J. 510, 511.)

"An agent who takes his principal's money under an express agreement to procure insurance, and unjustifiably fails to secure the same or make an effort in that direction, thereby assumes the risk and becomes liable, in case of loss, to pay as much of the same as would have been covered by the insurance policy for which his principal had paid, provided the same had been procured as directed." (*Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726.)

In the case of *Rezac v. Zima*, 96 Kan. 752, Ann. Cas. 1918B, 1035, 153 Pac. 500, Mr. Chief Justice Johnston, speaking for the court, stated the correct rule as follows: "Brokers are equally liable where they undertake to procure insurance and utterly neglect to obtain any insurance or fail to carry out

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material provisions of their agreement and a loss results. In such a case they are liable for as much as would have been covered by the insurance which they agreed to procure"—citing *Milliken v. Woodward*, 64 N. J. L. 444, 45 Atl. 796; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Sawyer v. Mayhew*, 51 Me. 398; *Diamond v. Duncan* (Tex. Civ. App.), 138 S. W. 429; *Mallery v. Frye*, 21 App. D. C. 105; *Criswell v. Riley*, 5 Ind. App. 496, 503, 30 N. E. 1101, 32 N. E. 814; *Backus v. Ames*, 79 Minn. 145, 81 N. W. 766; *Kaw Brick Co. v. Hogsett*, 73 Mo. App. 432; note, 38 L. R. A. (n. s.) 631.

And as between the insured and his own agent or broker authorized by him to procure insurance there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust reposed in him, and he may become liable in damages for breach of duty. If he is instructed to procure specific insurance and fails to do so, he is liable to his principal for the damage suffered by reason of the want of such insurance. The liability of the agent with respect to the loss is that which would have fallen upon the company had the insurance been effected as contemplated. Negligence on the part of the agent defeating in whole or in part the insurance which he is directed to secure will render him liable to his principal for the resulting loss. (22 Cyc. 1448, 9.)

The only case which has been called to our attention, presenting facts almost identical with the case before us is that of *Mayhew v. Glazier*, 68 Colo. 350, 189 Pac. 843, wherein Mr. Justice Allen, for the court, used language from which we quote with approval as particularly applicable to the case before us, as follows: " * * * It may be assumed that the plaintiff understood that Mayhew was an agent for an insurance company, but that fact tends to prove, rather than to disprove, the existence of an agreement, such as that alleged in the complaint, between the plaintiff and the defendant Mayhew in his individual capacity. If the plaintiff be-

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lieved that Mayhew was an insurance agent, he would naturally believe that such agent could cause a policy to be issued, and, if desiring insurance, might give to such agent an application for insurance. Such was the situation between the plaintiff and the defendant Mayhew. The plaintiff desired hail insurance, effective at the earliest possible moment. He gave the defendant his promissory note, payable to the defendant himself, as payment for the premium, with the understanding that the defendant would cause a policy to be issued without any delay.

* * * The contract sued upon, alleged to have been made between the plaintiff and the defendant Mayhew, did not conflict with any duty Mayhew owed to the insurance company. Mayhew was the agent of the insurance company for the purpose of soliciting applications for hail insurance, but had no authority to issue policies. * * * The contract made between the plaintiff and the defendant Mayhew was not against the interests of the insurance company. It did not call for the issuance of a policy different from the policies usually issued. It did not deprive the company of any premium due it. Mayhew took the note of plaintiff to himself. * * *

Whatever duty he owed to the company, it did not preclude him from acting as the agent for the insured in the matter of causing a policy to be issued, and in the matter of immediately forwarding plaintiff's application for insurance to the company or to some agent authorized to receive and approve such application. This case falls within the rule, stated in 22 Cyc. 1445, that 'the same person may act for different purposes as agent of the different parties to the contract, so that for one purpose he may be the agent of the insured, although as to the procuring of the insurance he also represents the company.' As above indicated, we find that the alleged contract, upon which the plaintiff brought this action, was one made by the defendant Mayhew in his individual capacity, and not as the agent of the insurance company, and that such contract is valid."

From the record presented on this appeal, the defendant cannot escape liability, and the judgment and order are affirmed.

Affirmed.

ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

MR. CHIEF JUSTICE BRANTLY: Upon the theory that the defendant in this case, a banking corporation, could lawfully conduct an insurance business, there is no objection to be made to the conclusion reached by my associates. Since, however, the defendant is a banking corporation, and in my opinion is presumptively not authorized by its charter to enter into contracts, either of insurance or to procure insurance, the contract upon which recovery is upheld in this case is *prima facie* invalid. This question seems not to have been agitated in the trial court, nor has it been presented by appellant in this court. I therefore concur in the affirmance of the judgment and order, but in doing so desire not to be understood as assenting to any implication that may be drawn from the opinion to the contrary, in any case in which the question may hereafter be presented.

STATE, RESPONDENT, v. FOUNTAIN, APPELLANT.

(No. 4,888.)

(Submitted October 29, 1921. Decided December 5, 1921.)

[203 Pac. 355.]

Criminal Law—Homicide—Evidence—Motive — Circumstantial Evidence—Sufficiency—New Trial — Newly Discovered Evidence—Lack of Diligence—Homicide—Motive—Evidence—Admissibility.

Homicide—Motive—Evidence—Admissibility.

1. In a prosecution for homicide, evidence of a robbery for participation in which deceased, a deputy sheriff, was attempting to arrest defendant was properly admitted for the purpose of showing motive to commit the crime for which defendant was on trial.

Same—Circumstantial Evidence—Sufficiency.

2. Evidence, circumstantial in character, *held* sufficient to warrant conviction of murder in the second degree, under the rule that where conviction is sought solely upon circumstantial evidence, the criminal circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

Same—New Trial—Newly Discovered Evidence—Lack of Diligence.

3. Where during the trial counsel for defendant cross-examined witnesses for the state with reference to the question whether certain marks claimed by the state to have been made by bullets were not made by blasting a beaver dam, an affidavit, on motion for new trial on the ground of newly discovered evidence, that the dam had been blasted shortly after the shooting occurred disclosed lack of diligence to discover the facts and was insufficient to warrant a retrial.

Appeals from District Court, Powell County; George B. Winston, Judge.

WILLIAM FOUNTAIN was convicted of murder in the second degree, and appeals from the judgment of conviction and from an order denying a new trial. Affirmed.

Mr. I. R. Blaisdell, for Appellant, submitted a brief and argued the cause orally.

1. Admissibility of evidence tending to prove other crimes is order to show motive for homicide, see notes in 7 Ann. Cas. 67; 62 L. R. A. 200.

2. Admissibility and sufficiency of circumstantial evidence, see notes in 62 Am. Dec. 179; 97 Am. St. Rep. 771; Ann. Cas. 1913E, 428.

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Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, submitted a brief; *Mr. Foot* argued the cause orally.

MR. COMMISSIONER JACKSON prepared the opinion for the court.

William Fountain was convicted of murder in the second degree for the killing of George Warburton, under-sheriff of Powell county, and sentenced to a term in the state penitentiary of not less than twenty nor more than forty years. From the judgment and an order denying a new trial defendant appeals.

It appears that on April 4, 1920, defendant and a companion named Bartrow, an escaped convict from the penitentiary, Huntsville, Texas, left Chicago and started west. They paid their fare as far as Jamestown, North Dakota, where a series of crimes was begun. The room they occupied in Jamestown was burglarized, an unoccupied house rifled, and two men who had given them a lift in a Studebaker car were compelled, at the points of Bartrow's and Fountain's guns, to teach the former how to run the machine, were then robbed and turned out on the road; the two bandits driving in the car until they disabled it. They reached Helena on April 18, 1920, and walked from there along the state road until they came to the home of one C. A. Olson, near Blossburg. They had supper and slept there that night, and after breakfast on the morning of the 19th repaid the hospitality of Olson by holding him up and taking everything of value there was in his cabin. Bartrow stepped up behind the old man and ordered him to throw up his hands, firing one shot alongside his foot. At the word of Bartrow the defendant trained his 22-caliber rifle on Olson and kept it there while the other ransacked the house. After they had collected the spoils, which included a 44-caliber rifle and a double-barreled shotgun, both of which they compelled Olson to clean and oil, inside and out, according to Olson's testimony, they had a

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discussion over the sum of fifty cents which defendant declared was owed to him by Bartrow. Bartrow paid over the money. Then defendant went over the goods of Olson that Bartrow had collected. After compelling Olson to put them up a lunch, they departed, going toward the west.

Early that afternoon, the defendant appeared at the railroad station at Blossburg and inquired of the agent Lyle concerning west-bound trains. He had no firearms visible on his person. About three-quarters of an hour later, Olson complained to Lyle of the holdup and the latter called the agent at Elliston and told him the robbers were walking toward that place. When Lyle heard the under-sheriff was on his way from Elliston to apprehend the men, he took a rifle and hurried down the track to meet him. As he rounded the curve between Blossburg and the spot where Warburton was killed, he thought he saw two men on the railroad track, but was not sure. He then came up where the wounded under-sheriff was lying, down from and south of the railroad-bed, and submerged to his waist in water. He asked him if his name was George Warburton and was answered in the affirmative; and when asked "if those fellows shot him," Warburton mumbled, "Yes." Lyle opened the coat and vest of the prone man, but could find no wound. He did not move him, but went back to a semaphore which stood 300 or 400 feet east of where Warburton was lying, to flag an east-bound freight train he knew was coming. When the train arrived, Lyle and the crew drew Warburton from the water and placed him in the caboose. They found he had been shot once in the abdomen just below the waistline and once in each leg. His badge, gun, and valuables were gone from his person, and he died without recovering consciousness, on the way to Helena.

The autopsy showed the following, omitting the sutured incised wound in the axilla, or armpit, which was made by the undertaker in embalming the body: A slight abrasion of the skin in the nipple line just below the right costal margin; a slight abrasion of the skin on the right side of the forehead

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and in the scalp in the parietal region; a round puncture wound in the abdomen in the interspinous line, two inches to the left of the midline measuring five-sixteenths by six-sixteenths inches; in the left leg a wound of entrance at the level of the upper border of the knee-cap, and one-half inch inside, and a wound of exit one inch below and internal to the wound of entrance, the tract of the wound being just beneath the skin; in the right leg a wound six inches below the patella and one inch lateral to the tibia, measuring three-eighths by five-eighths inches, pointed at the lower end; one and one-half inches and below and lateral to this wound in the right leg, another wound measuring three-eighths by five-eighths inches, which is oval, a tract of two of one-half inches beneath the skin connecting the two wounds; a puncture wound of the left buttock two and one-half inches below the posterior superior spine of the ilium, this being the wound of exit connected with the abdominal puncture.

That afternoon Warburton had boarded the head engine of an east-bound freight train at Elliston, going toward Blossburg, to apprehend Bartrow and Fountain for the robbery of Olson. As the train approached the semaphore near milepost 23, two men were observed by the occupants of the engine walking west on the south side of the tracks. One was taller than the other, and they were carrying a suitcase, a shotgun case, and two rifles. As the head engine passed them, Warburton dropped off on the north side of the track and walked west. He was observed by the fireman of the helper engine on the rear of the train to have nothing in his hands. The head brakeman of the train, who rode in the cab of the forward engine, looked back at the two men walking on the south side of the track. When they had reached the semaphore he observed the smaller begin to sit down, start up quickly, and follow his companion. The engine then going around the curve, his line of vision was cut off. Some time between 3:30 and 4 o'clock, and after Warburton was shot, defendant and Bartrow appeared at the ranch house of one Richard, near

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Rich Spur, not far from the scene of the shooting. Bartrow had a long wound in the left upper arm and shoulder, which he wanted dressed. The defendant told there that he and "his buddy" were hunting and that he "shot his buddy." Bartrow had a six-shooter half concealed by his trousers, and also the 44-caliber rifle. The defendant was carrying a gun case and had an overcoat on his arm. His undercoat was buttoned and he had not the 22-caliber rifle. About 4 o'clock the foreman of the Elliston Line Company, who had been told of the killing of Warburton and to be on the lookout, saw two men who had left the railroad track and were going due north. He notified Elliston and shortly afterwards a posse from there joined some men of his. The posse called upon the two men to surrender. Not heeding the calls, fire was opened on them, and one, Bartrow, fell, shot through the hips, and the other, Fountain, putting up both hands, came down the hill and surrendered. Warburton's gun, a 32/20, his belt and scabbard, were strapped around defendant's waist, and in his pockets were found many of the articles stolen from Olson. Bartrow died on the way to Deer Lodge, without speaking.

From one of the pockets of Bartrow's trousers, which showed no sign of a bullet hole, among other things were taken three bent silver dollars, which fitted together. Warburton's custom was to carry silver coins in his lower right vest pocket, and defendant says the three silver dollars came from Warburton's person; that Bartrow told him they came from his vest. In examining Warburton's vest, the coroner found in the lower right vest pocket a bullet hole, and a 32/20 bullet that fitted into the bent dollars when put together fell out. No gun of such caliber was in possession of any of the three men, save Warburton.

The railroad tracks from the semaphore run, roughly speaking, east and east. On the south side of the tracks, practically all of the distance to beyond where Warburton was found, there is willow brush, and there was then much water. The

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ground was covered with a soft, slushy snow. The willows were sparse in the immediate vicinity of Warburton, but some distance south of him they were quite thick and rose to a height of from eight to ten feet. Between Warburton and a point in the dense, high willows, 200 feet south, where a wet mackinaw belonging to Bartrow was found, there were deep water and a beaver dam. A track of footprints led from Warburton's position through the willows, water, and beaver dam to where the mackinaw was discovered, and there the willows were pounded down and several bore bullet marks. The footprints continued on to and down the country road for about 100 feet, where they entered the creek and were lost to view. Both Bartrow and Fountain were quite wet when captured.

Although the 44-caliber rifle had not been shot by anyone after the arrest of defendant, and although it had been cleaned by Olson prior to having been taken by the defendants, yet it showed unmistakable signs of burned powder in the barrel. The barrel of the 22 was also found to have burned powder particles in it. This latter gun was discovered, stock and barrel some distance apart, north of the track near Rich Spur.

Defendant predicates error in the giving and refusing of instructions, admission and exclusion of evidence, and complains of the sufficiency of the evidence to support the verdict. The jury was properly instructed, and the rulings of the court admitting and excluding evidence were correct.

The testimony which proved the robbing of Olson was admitted solely for the purpose of showing motive to commit the crime of murder, and the jury was exhaustively and cautiously instructed on this point. "Such evidence goes to the jury as a matter of necessity, for the purpose alone of showing motive on the part of the accused to commit crime, and no more than is necessary to show motive should be allowed, and then the jury told the purpose for which the evidence is to be considered by them." (*State v. Geddes*, 22 Mont. 68,

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91, 55 Pac. 927, quoting *Martin v. Commonwealth*, 93 Ky. 189, 19 S. W. 580.)

No known person now alive was present at the actual killing of Warburton save the defendant, and the evidence on this point for the state is entirely circumstantial. The defendant took the stand on his own behalf. Although prior to the trial he declared he was eighteen years of age, he stated he was but sixteen when on the stand. He admitted the various depredations prior to the killing, but sought to escape culpability on the score that he was under the domination of Bartrow, was afraid of him, and could not get away from him. He stated he met Bartrow in Chicago Heights, where defendant lived with his mother. Under what circumstances they met is not shown. Shortly after making his acquaintance, they came west to trap. A natural inquiry is here pertinent as to how a youth of such tender years, and previously good character as was testified to in his behalf, became thrown in with an escaped convict. The escaped convict knows he is a pariah and his habitat is in the depths of the underworld. The defendant went into detail of the holding up of the automobile, in which he took part, and likewise admitted the Olson robbery.

Defendant's story of the tragedy is that he and his companion had been passed by two freight trains; that Bartrow was ahead of him a few paces as the second one was passing, and as he started to sit down on the base of the semaphore Bartrow said that they did not have much time, so he arose and followed him. He denies that he looked under the train or that he saw Warburton until the latter came around the end of the train and told him and his companion they were under arrest.

As Warburton came into view, defendant says he walked between defendant and Bartrow, searched the defendant for arms, told him to drop his guns, and then pursued Bartrow, who had a 44-rifle in his hands and a six-shooter on his person, down the track to the spot where Warburton was killed.

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Bartrow and the under-sheriff engaged in a pistol duel there and Warburton fell. After Warburton had fallen, Bartrow dropped, picked himself up, climbed the fence on the right of way, and went south through the brush over to the county road. Defendant says he remained standing where he was, and, when called by Bartrow, started to cross to him, but fell in a deep hole of water and turned back again to the tracks and that then Bartrow came back to the body of Warburton and defendant walked down to that point. He says Bartrow robbed the dying man and told defendant to wear the belt, gun and scabbard taken from him. Then they went to the Richard place. He told a false story of the killing there, he says, because he was afraid of his companion. For the same reason he threw away the 22-rifle.

In the case of *State v. Riggs*, 61 Mont. 25, 201 Pac. 272, the [2] last word on the law of circumstantial evidence in this state is succinctly laid down by Mr. Justice Galen, when he states: "Where a conviction is sought solely upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other, and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis." In the instant case, while the details of the tragedy itself, from the viewpoint of the state, are circumstantial, nevertheless the entire case is not confined solely to circumstantial evidence. The defendant admitted being "the buddy" of Bartrow and a party to several crimes prior to the killing. While he professed fear of Bartrow, his evidence showed that on many occasions he had ample opportunity to either escape from the man or notify the authorities concerning his character. He carried firearms to the scene of the tragedy. He told a lying tale concerning the wounding of his companion. He was in flight, escaping to the hills, when caught. He had on his person Warburton's belt, scabbard and gun. Warburton had been shot at with this very weapon, as shown by the silver dollars and the 32/20 bullet that fell from Warburton's vest. Immediately after he was captured,

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defendant denied having had any part in the Olson robbery, saying he did not even have a gun. He denied that the 44-rifle had been shot at all while in the possession of himself and companion, and at the trial stated that Olson had not cleaned the rifle on the inside. But in a prior statement he declared that Olson had cleaned the gun with a ramrod.

Much stress is laid on the size of the wounds by counsel for defendant, who contends that these "dumb mouths" show his client's innocence. Dr. Woodward testified that from a comparison of the size of the wound in the right leg and the other ones in the body, in his opinion, two guns of different caliber were used. Dr. Marquette, a witness for the defense, stated that the wounds in the legs were large enough to have been made by a 44-caliber missile. This evidence was certainly sufficient for the jury as to whether or not one or two men were shooting at Warburton. And if it be argued that Bartrow emptied his six-shooter and then shot the rifle, or *vice versa*, why a positive denial on the part of the defendant that the 44 was shot at all? While defendant's memory is clear and accurate in relating his story, his mind is a wondrous blank with respect to his possession of the 22-caliber rifle.

It is argued that the tracks in the soft snow, in some way or another, how, it cannot be ascertained from the record nor the argument, corroborated defendant's story. The physical condition of the ground was testified to by several witnesses, but first noticed in detail by the witness Misner, a forest ranger, who scrutinized it at 9 A. M., April 20, the morning after the shooting. He testified positively to the finding of Bartrow's coat, the two sets of tracks there, the bullet marks on the willows, and declared with certainty there had been no blasting of the beaver dam prior to his search. Several witnesses testified to the tracks going up and down the roadbed and to tracks which left the railroad near the semaphore and went down into the water. But there is nothing in the record to show the snow was fresh, and many people had been in the vicinity some days after Misner's examination of the ground,

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and testimony concerning footprints found three or four days after the tragedy afford no enlightenment.

In support of his motion for a new trial, defendant presented an affidavit which set forth, as newly discovered evidence learned since the time of the trial, that the beaver dam had been blasted shortly after the tragedy and the marks on the willows were caused by flying fragments of the pipe that was used as a container for the explosive. It is quite strange that counsel for the defendant cross-examined two witnesses on the very point of blasting the beaver dam. But the witness Misner positively declared there had been no blasting of the dam prior to his search of the willows, and that: "The blasting at this beaver dam was after I was there. I heard there was some blasting there." Proper diligence then and there should have moved counsel to discover, if he cared to, or did not know, the facts connected with the destruction of the beaver dam.

Eliminating all of defendant's case, the evidence was sufficient for the jury, under the rule of *Riggs Case*, and all of the circumstances, when coupled with defendant's own testimony, leave no room for any rational hypothesis of innocence.

For the reasons herein stated, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Affirmed.

Rehearing denied January 6, 1922.

SMITH, ADMINISTRATRIX, APPELLANT, v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO., RESPONDENT.

(No. 4,510.)

(Submitted October 31, 1921. Decided December 5, 1921.)

[202 Pac. 766.]

Personal Injuries—Master and Servant—Safe Place to Work—Contributory Negligence—Proximate Cause.

Personal Injuries—Master and Servant—Safe Place to Work—Contributory Negligence—Proximate Cause—Evidence—Insufficiency.

1. In an action for damages for the fatal injury of a machinist helper in defendant railway company's shops, evidence *held* to show that the injury was proximately caused by his own reckless haste in releasing a chain which held in a perpendicular position a locomotive drive-wheel tire weighing between 1,200 and 1,400 pounds, which fell upon him, and was not due to the alleged negligence of defendant in failing to provide a safe place for him in which to work.

Same—Proximate Cause—Pleading and Proof.

2. In an action to recover damages for personal injuries suffered by reason of a breach of duty owed to him by defendant, plaintiff must allege facts and circumstances disclosing a breach of duty and establish by his evidence that such breach was the proximate cause of the injuries.

Appeal from District Court, Custer County; C. J. Dousman, Judge.

ACTION by Edith Smith, as administratrix of the estate of David M. Smith, against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for defendant on an instructed verdict and plaintiff appeals. Affirmed.

Mr. Sharpless Walker and *Mr. John P. Devancy*, for Appellant, submitted a brief and one in reply to that of Respondent; *Mr. Walker* argued the cause orally.

It was the defendant's duty to exercise ordinary care and diligence in providing plaintiff's intestate with a reasonably safe place to work, having in view the surrounding facts and circumstances, the nature of the work and time of the performance thereof. (*O'Brien v. Corra-Rock Island Min. Co.*,

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40 Mont. 212, 105 Pac. 724; *Kimbol v. Industrial Acc. Com.*, 173 Cal. 351, Ann. Cas. 1917E, 312, L. R. A. 1917B, 595, 160 Pac. 150; *Kroeger v. Marsh Bridge Co.*, 138 Iowa, 376, 116 N. W. 125; *Thomas v. Wisconsin Cent. Ry. Co.*, 108 Minn. 485, 23 L. R. A. (n. s.) 954, 122 N. W. 456; *Lavartue v. Ely Lumber Co.*, 213 Mass. 65, 99 N. E. 469; *Atkins v. Madry*, 174 N. C. 187, 93 S. E. 744; *Poos v. Fred Krug Brewing Co.*, 101 Neb. 491, 163 N. W. 840; *Moulton v. St. Johns Lumber Co.*, 61 Or. 62, 120 Pac. 1057; *Producers Oil Co. v. Eaton*, 44 Okl. 55, 143 Pac. 9; *South v. Seattle P. A. & W. Ry. Co.*, 99 Wash. 51, 168 Pac. 896.)

Assuming that plaintiff's intestate was guilty of contributory negligence and that such negligence was a proximate cause of the injury, still, if defendant was guilty of negligence which contributed to the accident and injury, plaintiff would be entitled to recover. (Chap. 29, Laws 1911; *Wastl v. Montana Union Ry. Co.*, 24 Mont. 159, 61 Pac. 9; *Grand Trunk Western R. Co. v. Lindsay*, 201 Fed. 836, 120 C. C. A. 166; *Illinois Cent. R. Co. v. Porter*, 207 Fed. 311, 125 C. C. A. 55; *Sandidge v. Atchison etc. R. Co.*, 193 Fed. 867, 113 C. C. A. 653; *State v. Baltimore etc. Ry. Co.*, 133 Md. 411, 105 Atl. 532; *Grand Trunk Western R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26; *Anest v. Columbia & P. S. R. Co.*, 89 Wash. 609, 154 Pac. 1100; 18 R. C. L. 638, 639; 29 Cyc. 528.)

Mr. Geo. W. Farr, for Respondent, submitted a brief; *Messrs. Murphy & Whitlock*, of Counsel; *Mr. A. N. Whitlock* argued the cause orally.

The plaintiff was not entitled to have the case submitted to the jury, unless there was in addition to the fact of the occurrence of the accident some specific testimony which fairly tends to show that the defendant was guilty of negligence which proximately caused the injury complained of. (Labatt on Master & Servant, sec. 835; *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212; *Shadford v. Ann Arbor etc. R. Co.*, 111 Mich. 390, 69 N. W. 661; *Gulf etc. Ry. Co. v. Abbott* (Tex.

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Civ.), 24 S. W. 299; *Olsen v. Montana Ore P. Co.*, 35 Mont. 400, 89 Pac. 731.)

If plaintiff's testimony leaves either the existence of negligence of the defendant or that such negligence was the proximate cause of the injury in conjecture, it is insufficient to establish plaintiff's case; if the conclusion to be reached from the testimony is equally consistent with some theory inconsistent with either of the issues to be proven, it does not tend to prove within the meaning of the rule above announced. (*Winnicott v. Orman*, 39 Mont. 339, 102 Pac. 570; *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.)

The mere happening of an accident by which an employee is injured during the course of his employment, standing alone, does not furnish the basis for an inference of culpable negligence. (*Barry v. Badger*, 54 Mont. 224, 169 Pac. 34; *Lyon v. Chicago, M. & St. P. Ry. Co.*, 50 Mont. 532, 148 Pac. 386.) Negligence must be shown; it will not be presumed. (*Reino v. Montana Mineral L. D. Co.*, 38 Mont. 291, 99 Pac. 853.) And the burden of proof is on plaintiff to show negligence. (*Byrnes v. Butte Brewing Co.*, 44 Mont. 328, Ann. Cas. 1913B, 440, 119 Pac. 788; *Lyon v. Chicago M. & St. P. Ry. Co.*, 50 Mont. 532, 148 Pac. 386; *Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583; *Woods v. Latta*, 35 Mont. 9, 88 Pac. 402; *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067.)

Negligence never gives rise to a cause of action unless it is the proximate cause of the injury. (*Pure Oil Co. v. Chicago, M. & St. P. Ry. Co.*, 56 Mont. 266, 185 Pac. 150.) If the accident was due to the plaintiff's own, and not the company's negligence, then it is not liable. (White on Personal Injuries, sec. 39; *Benage v. Lake Shore & M. S. Ry. Co.*, 102 Mich. 72, 60 N. W. 286; Labatt on Master & Servant, sec. 1227.)

The rule is well established that an employee is expected to exercise ordinary care to avoid injury to himself. He is expected to observe the ordinary operation of the laws of

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nature, and he is reasonably held to know matters within the common observation and knowledge of a reasonably prudent man. These principles are frequently applied in determining the liability where a servant is injured while lifting a heavy weight or object which he knows is too heavy for him, and it has been frequently held that a master is not liable for injuries caused by overexertion, as the servant knows better than anyone else the limitations of his physical power. In an action brought to recover damages for injuries caused by attempting to lift a hand-car from the track to avoid collision with a train, it was held that the trial court erred in refusing to charge that if the weight of the car and the number of men necessary to handle it was neither open nor patent to common observation, the plaintiff cannot recover. (*St. Louis etc. Ry. Co. v. Lemon*, 83 Tex. 143, 18 S. W. 331, 17 Am. Neg. Cas. 645; *Ervin v. Northern Pac. Ry. Co.*, 69 Wash. 240, 124 Pac. 690; *Creamus v. Great Northern Ry. Co.*, 131 Minn. 34, 154 N. W. 616.) As illustrative that if a servant attempts to hold up or lift a heavy object beyond his capacity, that it is not negligence of the employer if he is injured, but his own act, see *Ferguson v. Phoenix Cotton Mills Co.*, 106 Tenn. 236; *Roberts v. Indianapolis Street Ry. Co.*, 158 Ind. 634, 64 N. E. 217, 12 Am. Neg. Rep. 387; *International & G. N. Ry. Co. v. Figures*, 40 Tex. Civ. App. 255, 89 S. W. 780; *Leitner v. Grieb*, 104 Mo. App. 173, 77 S. W. 764; *Stenvog v. Minnesota Transfer Ry. Co.*, 108 Minn. 199, 17 Ann. Cas. 240, 25 L. R. A. (n. s.) 362, 121 N. W. 903; *San Antonio Traction Co. v. De Rodriguez* (Tex. Civ. App.), 77 S. W. 420; *Worlds v. Georgia Ry. Co.*, 99 Ga. 283, 25 S. E. 640.

MR. JUSTICE COOPER delivered the opinion of the court.

This is an appeal from a judgment in favor of defendant. At the close of plaintiff's evidence in rebuttal, the defendant moved for an instructed verdict upon the ground that the evidence of defendant's negligence was insufficient to take

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the case to the jury. From the judgment upon the order sustaining the motion, plaintiff appeals.

The complaint alleges that defendant negligently and carelessly caused and permitted piles and pieces of scrap iron, piston rods, unused material, and refuse to accumulate around and about the place at which it was the duty of its machinists and their helpers, including the deceased, to perform repair work; that the defendant knew of the dangerous, unfit and unsuitable condition so created, and existing, or, in the exercise of reasonable care could have known thereof; that the deceased was not aware, nor by the exercise of reasonable and ordinary care, in pursuit of his employment as machinist's helper could be expected to learn of such condition; that while the latter was engaged in attempting to remove a certain chain from a heavy and cumbersome locomotive wheel, he stumbled and fell, or was thrown by reason of stepping backward into the pile of scrap iron, piston rods, and unused material and refuse, so negligently left there by defendant, and sustained injuries from which he subsequently died.

In another paragraph of the complaint it is alleged that the scrap iron, piston rods, and unused material over which deceased stumbled, fell and received his injuries were partly covered and concealed by snow, so that it was difficult, if not impossible, for him to have ascertained their presence by visual inspection of the place upon and over which he was obliged to move in order to release the chain from the rim of the driver.

The answer and reply thereto present the following questions: Was the defendant guilty of negligence? Did the deceased assume the risk? Was he guilty of contributory negligence, or did he bring the injury upon himself, exclusively by his own negligence? Since in our opinion the last inquiry must be answered in the affirmative, it is the only one it is necessary to notice.

The evidence given upon the trial disclosed the following [1] facts and conditions: The plaintiff's intestate was a ma-

chinist's helper employed in the shops of the defendant at Miles City. He was familiar with the work for which he was employed and in which he was engaged at the time of his injury. The place in question was an open space about eighty feet wide between the machin-shop and the round-house, upon which were constructed seven or eight tracks, built and maintained by the defendant for the purpose of storing engine-drivers, car-wheels, trucks and other parts of equipment used in the conduct of defendant's business, and in suitable weather, for making repairs thereon as occasion required. On the evening of January 7, between the hours of 7 and 9:30 o'clock, deceased and another helper assisted Croonenberg, the machinist, in taking the tires from a pair of locomotive drive-wheels. The undertaking was carried out by coupling an air-hose leading from an air-tank to a piece of pipe, through which was blown a flame until it had sufficiently expanded the tire to enable it to be knocked off the rim with a sledge-hammer. After the tire was loosened from the rim and fastened with the chain, it was left by the crew, standing nearly perpendicular, but leaning a little toward the machine-shop. It was nearly new, with a rim three and one-half inches in thickness, five or five and one-half feet in diameter measured from the inside, the flange extending above the surface of the tire one and one-half or two inches, and weighed between 1,200 and 1,400 pounds. Croonenberg stated that he steadied the tire with his hand alone; that it could be off of perpendicular about six inches until it got to a point where it could be steadied with the hand; that when they left it the night prior to the accident it was off perpendicular less than six inches as it rested on the flange, and that to turn it from perpendicular you would thrust it back with your foot; that it would not require a lot of strength to hold it; if it was resting on the flange, he thought he could hold it; that he stood in front of the tire and balanced it as it rested on the flange when he put the chain on, and that that was the way everybody did it; that if he took it off himself he

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would "bring it out at the bottom, and if it started to fall he would jump aside and let it fall"; that removing the chain and returning it to the storehouse was part of the job; and that the helpers usually did it. He testified also that "Smith was going to get the chain the next morning. At the time he was hurt, that is what he was doing. I could take the chain off alone by putting my hand against the tire. * * * I put a piece of waste against the tire, and my hand against the waste, as she was hot. When I did that I stood right in front of it."

On the morning of January 8, immediately after 7 o'clock, and at approaching daylight, while deceased was in the act of removing the chain from around the rim and tire as it was left the night before, the tire fell over and upon him, crushing him so severely that his death resulted the following evening between 5 and 6 o'clock. At the place of the accident machinery and equipment were kept piled in places between the tracks for the purpose of being "worked over again." Material that could not be used again was taken to the scrap pile. It was one of the places used by the defendant for "storing piston rods" and "usable" material, including new piston rods, just as they were purchased. As one of the plaintiff's witnesses stated: "It was the regular place to keep them." This space is described by Lars Villanger, another of plaintiff's witnesses, and the helper who assisted the machinist and the deceased to put on the chain the night before, as follows: "A wooden platform with a bunch of tracks on it is lying between the roundhouse and the machine-shop. The wooden platform lies on the ground. It consists of two-inch planks. They lie close together. The tracks run north and south; I could not say for sure how many there were; about seven or eight. * * * At the point where this accident happened, the machine-shop wall was about nine feet from the rail. * * * The snow with reference to this nearest or west wall or these piston rods was about five feet from the rail. The snow and ice extends out about three feet to-

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ward the track or nearest rail. * * * It had been cleared away where they are working. Well, it wasn't all cleared away where they are working."

John Laney, the next witness, testified: "That was one of the places where the men worked when they had cause to work out there." His account of the happening is as follows: "When I first saw the tire it was tipping slightly, as anything would when pressing towards you, and he merely stepped back to brace himself. He had his hands on the tire; stepped back trying to brace the tire. He was trying to hold over so it would not tip very much when I first seen him. When I first seen it, it wasn't so overbalanced, but what he could have held it, if he could have held his feet. * * * I have handled those tires. They are not so awfully heavy that a man can't brace a whole lot. I don't mean a man can hold one of them, but if they don't press too far towards him, he can brace it back. * * * Before he fell, I don't know what was on the ground."

Clarence Siegert, foreman of the store department at the time of the accident, testifying for defendant, described what he saw of it as follows: "When I first noticed Smith the tire was not beginning to fall. I saw him before the tire started to fall. I did not pay any particular attention to him, though, until the tire fell. I saw him before he started to fall, but that is when I noticed him the most in particular when it started, and he hollered for help. I didn't see his feet trip and catch on anything. As he started back I didn't notice his feet in particular, but I could see him there; that is, I thought that is how it happened that his feet caught, and that made him fall."

By other testimony given by the plaintiff's witnesses, the place of the accident was in the same condition when the tire fell as it had been left the night previous by the machinist, the deceased, and the other helper. What unbalanced the tire no witness ventured to say, because none of them saw it begin to fall. They could not therefore attribute Smith's fall to

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conditions about his feet to the exclusion of the weight of the falling wheel. The efforts made to clear up the place before starting the work clearly negative the claim that the accident was due to the failure of the defendant to provide deceased with a safe place to work. Upon this point the testimony of Croonenberg stands alone, and is undisputed. It is as follows: "The first thing we did, we cleaned out all the unnecessary things we left around there, blower, sheet iron, and pipes and such all, in order to have plenty of room to take that particular tire off. The purpose of cleaning out this stuff I refer to was to make it safe and everything, to make it safe to work around there; to make it safe to knock off the tire so we wouldn't stumble over everything there. The first thing I started to do was to remove material to make it a safe place to work there. I completed my work so far as my knowledge went. I removed the material that I spoke of."

Interpreting the evidence all in plaintiff's favor, and giving it the force of proven facts, it is impossible to escape the conviction that the accident was due solely to the reckless haste with which deceased went about the task of removing the chain, rather than the position of the piston rods, or the presence of snow and ice beneath his feet.

That the plaintiff produced upon the trial all the evidence available to support the charge of negligence in failing to provide her husband a safe place to work seems quite clear. Yet the proof not only failed to furnish debatable ground upon that phase of the case, but went the other way far enough to establish the fact that the deceased brought the injuries upon himself by his carelessness in removing the chain, thus making escape from the falling tire impossible. Upon this outline of the evidence, we are forced to the conclusion that the efficient proximate cause of Smith's injuries was the removal of the chain, while the tire was unbalanced in his hands, and not the negligence of the defendant in fail-

ing to provide him a safe place to perform that piece of work.

“It is the rule,” says Chief Justice Brantly, “recognized [2] by the courts everywhere that, in order for plaintiff to recover for personal injuries suffered by reason of a breach of duty owed to him by defendant, it is indispensably necessary that he allege facts and circumstances disclosing such breach of duty, and also establish by his evidence that it was the proximate cause of his injury. (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Bracey v. Northwestern Imp. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; 4 Labatt on Master & Servant, sec. 1570.)” (*Nelson v. Northern Pac. Ry. Co.*, 50 Mont. 516, 526, 148 Pac. 388, 390.)

No amount of sympathy for the dependents of the unfortunate victim can be permitted to affect the application of this well-established principle to the facts as they are here presented.

The judgment is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur.

STATE, RESPONDENT, v. VUCKOVICH, APPELLANT.

(No. 4,895.)

(Submitted October 29, 1921. Decided December 5, 1921.)

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Criminal Law—Homicide—Drawing of Jury—Alien Jurymen—Information—Absence of Preliminary Examination—Exhibits—Experiments—Evidence—Admissibility.

Homicide—Alien as Juror—Evidence—Insufficiency.

1. Evidence held sufficient to show that a foreign-born juror sitting in a capital case was a citizen of the United States at the time of the trial.

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Same—Jury Trial—Extent of Right of Defendant.

2. A party litigant in neither a civil nor criminal case has a vested right to have his case passed upon by a jury taken from the panel drawn at any certain time, his rights in that respect being sufficiently protected if a fair and impartial jury was drawn at the time and in the manner recognized by law.

Same—Jury Panel—Drawing Jury—When Defendant may not Complain.

3. Where the trial court, instead of ordering a panel of regular jurors drawn in a number deemed by it sufficient for the term, had them drawn under three successive orders as occasion required, defendant was not in position to complain of the procedure followed, he not having been prejudiced thereby, and section 6348, Revised Codes of 1907, not limiting the number which may be drawn.

Same—Information—Filing Without Preliminary Examination.

4. The district court may grant leave to file an information without previous examination of defendant by a committing magistrate.

Same—Information—Verification by County Attorney—Effect.

5. Verification of an information by the county attorney is not a proper cause for setting it aside.

Same—Information—Surplusage.

6. An information charging murder in the first degree, otherwise sufficient, was not rendered insufficient by the absence of the words "a felony," after the words "murder in the first degree," hence the insertion of the two words by order of court upon complaint that the copy served upon defendant did not contain them did not render the information subject to a motion to quash.

Same—Evidence Showing Feeling Between Defendant and Accused Admissible.

7. Testimony of a police magistrate that defendant had on a certain day pleaded guilty to a charge of disturbing the peace by committing an assault upon deceased, and that of a police officer that he had advised defendant to keep away from the house of deceased to avoid trouble was admissible as showing the condition of feeling existing between the parties.

Same—Exhibits—Admissibility.

8. The bullet extracted from the body of deceased, whether secretly done or not, an empty pistol shell found at the scene of the homicide, a pistol and loaded shells taken from the person of the defendant, etc., were properly admitted in evidence.

Same—Experiments Made Out of Court—Admissibility.

9. Evidence of experiments made out of court with a pistol and shells taken from the person of defendant was admissible within the discretion of the trial court, if it tended to corroborate the position taken by an expert witness, caution being exercised in receiving it.

Same—Evidence—Sufficiency.

10. Evidence held sufficient to warrant conviction of murder in the first degree.

4. Preliminary examination as prerequisite to filing of indictment or information, see note in *Ann. Cas.* 1916E, 312.

9. Admissibility of experiments as evidence, see notes in 53 *Am. St. Rep.* 375; 7 *Ann. Cas.* 216; *Ann. Cas.* 1912B, 296; 8 *A. L. R.* 18.

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Appeals from District Court, Missoula County; Theodore Lentz, Judge.

JOE VUCKOVICH, convicted of murder in the first degree, appeals from the judgment and an order denying his motion for a new trial. Affirmed.

Mr. James L. Wallace, Mr. Charles N. Madeen and Mr. Charles A. Russell, for Appellant, submitted a brief; *Mr. Russell* argued the cause orally.

A long line of authorities resting upon reason and logic and not upon precedents which, as Justice Holmes, in *Brown v. United States*, 65 L. Ed. 619, says, "have had a tendency to ossify into specific rules without much regard for reason," holds that grounds of disqualification for which a juror might have been challenged, if unknown, and not to be discovered by reasonable diligence before verdict, may be urged as grounds for new trial. (*Hill v. People*, 16 Mich. 351; *Quinn v. Halbert*, 52 Vt. 353; *Mann v. Fairlee*, 44 Vt. 672; *Williams v. McGrade*, 18 Minn. 82; *Essex v. McPherson*, 64 Ill. 349; *Rice v. State*, 16 Ind. 298; *Guykowski v. People*, 1 Scam. (Ill.) 476.)

The presumption is that a person who was once a citizen of a foreign country, though residing in another, still remains a citizen of such foreign country. (*State v. Jackson*, 79 Vt. 504, 8 L. R. A. (n. s.) 1245, 65 Atl. 657.)

The defendant in a capital case waives nothing. Objection to alienage may be taken after verdict. (*Mann v. Town of Fairlee*, 44 Vt. 672.)

The district court in ordering a jury drawn while another jury was in attendance at the term undoubtedly believed that the innovation would be more conducive to the convenience of persons on the jury list. Clearly, the idea was that the first jury summoned would serve for a period of two weeks and then be discharged, and a new jury summoned while the old jury was in attendance would report and complete the

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business of the court for that term. However that may be, it must be apparent from a consideration of the statutes and the decided cases that the court made a material departure from the recognized practice and from the lawful method of drawing and impaneling a jury. (*State v. McHatton*, 10 Mont. 370, 25 Pac. 1046; *Dupont v. McAdow*, 6 Mont. 226, 9 Pac. 925; *State v. McHatton*, 10 Mont. 370, 25 Pac. 1046; *State v. Landry*, 29 Mont. 218; 74 Pac. 418.)

The error in admitting testimony that defendant previously to the homicide had pleaded guilty to a charge in police court of disturbing the peace by slapping the decedent is clearly apparent. If true, it had no tendency to prove that he later murdered her.

The court erred in overruling defendant's demurrers and erred in overruling defendant's motions for bills of particulars. A bill of particulars does not remedy the defect of an indictment which fails to set forth the essential elements, the material facts that are claimed to constitute the alleged offense. (*United States v. Tubbs*, 94 Fed. 356, 360; *Floren v. United States*, 186 Fed. 961, 108 C. C. A. 577; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588 [see, also, *Rose's U. S. Notes*].)

Evidence of experiments should be received with the greatest caution, so that the jury should not be confused or misled. (*State v. Boss*, 251 Mo. 107, 157 S. W. 782; *Harris v. State*, 62 Tex. Cr. 235, 137 S. W. 373.)

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, submitted a brief; *Mr. Foot* argued the cause orally.

The competency of a juror will be presumed until the contrary is shown, and it is incumbent upon the appellant to show the alienage of the juror by evidence that will overcome the presumption. (*State v. Mott*, 29 Mont. 292-307, 74 Pac. 728; *Hammond v. Noble*, 57 Vt. 193; *Richards v. Moore*, 60 Vt. 449, 15 Atl. 119; *State v. Weaver*, 58 S. C. 106, 36

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S. E. 499; *San Antonio etc. Ry. Co. v. Lester* (Tex. Civ.), 84 S. W. 401.) While alienage is generally a disqualification to act as a juror, it has been held that an objection to a juror on that ground is too late when made after the verdict is rendered. (*Territory v. Harding*, 6 Mont. 323, 12 Pac. 750; *Territory v. Hart*, 7 Mont. 489, 17 Pac. 718; *Territory v. Baker*, 4 N. M. 117, 13 Pac. 30; *State v. Quarrel*, 2 Bay (S. C.), 150, 1 Am. Dec. 637, and note.)

Defendant contends that the method he followed in the selection of the jury was a substantial and material departure from the authorized method of selecting a trial jury, and that his challenge to the panel should have been sustained. In 24 Cyc. 231 (b), we find a general rule as follows: "A special venire may be ordered where the defect of jurors is caused by a discharge by the court of the regular panel previously in attendance, provided the action of the court in discharging this panel and summoning another was in good faith and not for the purpose of evading a trial by the regular jury." (*State v. Lutz*, 85 W. Va. 330, 101 S. E. 434; *Simmons v. Cunningham*, 4 Idaho, 426, 39 Pac. 1109; *Ohio & M. Ry. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Hunt v. Scobie*, 45 Ky. 469; *State v. McCartey*, 17 Minn. 76; *Bennett v. Tintic Iron Co.*, 9 Utah, 291, 34 Pac. 61.) It is presumed that the trial court acted within its jurisdiction and excused the first jurors drawn for proper cause, as it is always a presumption that an official acts according to the law (*State v. Bowser*, 21 Mont. 133, 53 Pac. 179), and the burden of showing that such act was unlawful and not within the court's judicial discretion was upon the appellant, and this he has failed to do. (*State v. Bowser*, *supra*; *State v. Jones*, 32 Mont. 442, 80 Pac. 1095.) The court had full power to summon a venire of additional jurors in advance of the time needed and in anticipation of the exhaustion of the regular panel. (24 Cyc. 234; *Lambright v. State*, 34 Fla. 564, 16 South. 582; *O'Connor v. State*, 9 Fla. 215; *In re Foster*, 13 Abb. Pr. (n. s.) (N. Y.) 372.) It has even been held that

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a challenge to the array is waived by a challenge to the polls (16 R. C. L., sec. 56, p. 239; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524), and that is the situation in the instant case.

There was no error in admitting testimony that appellant prior to the homicide had pleaded guilty to an assault on the deceased. (13 R. C. L. 912; 21 Cyc. 915.) In the case of *People v. Colvin*, 118 Cal. 349, 50 Pac. 539, it was held that the general nature of any trouble between the defendant and the deceased before the homicide might properly be shown, even if such evidence did tend to degrade the defendant in the minds of the jury. (See, also, *People v. Kern*, 61 Cal. 244; *Kelly v. State*, 49 Ga. 12; *Crass v. State*, 31 Tex. Cr. Rep. 312, 20 S. W. 579; *State v. Shafer*, 26 Mont. 11, 66 Pac. 463.)

MR. CHIEF COMMISSIONER POORMAN prepared the opinion for the court.

The defendant was informed against, tried and convicted of the crime of murder in the first degree. From the judgment entered on the verdict and an order overruling his motion for a new trial defendant has appealed.

I. The defendant claims that "the judgment and verdict [1] are nullities because an alien sat upon the jury." In support of this contention the defendant presented records and affidavits that the father of the juror Jacob Barer was not a citizen of the United States until the fourth day of June, 1913, when he was duly naturalized as a citizen of the United States, and that he formerly resided in Winnipeg, Province of Manitoba, Canada. An affidavit was also presented and filed by the juror to the effect that he was born at the city of Winnipeg, Province of Manitoba, Dominion of Canada, on the seventeenth day of March in the year 1892. It is also made to appear by affidavit of one of defendant's attorneys that in response to a letter written by him, he "received from the provincial board of health, vital statistics

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branch, of Manitoba, a letter with reference to the birth of said Jacob Barer, together with certificate of birth." The letter received was signed by E. N. Wood as secretary, and stated:

"I am unable to trace a registration of the birth of Jacob Barer, 17 March 1892. The following record No. 215 for the year 1892, appears in the records of this department: 25 Feb. 1892. I, Coppel Borer, at Fonseca St., Winnipeg, Father Isak Borer (Pedlar) Mother, Mali Weisman."

A certificate of birth was also presented, as follows:

"Provincial Board of Health [Seal] Manitoba.

"Certificate of Birth

"On the 25th day of February, 1892, at Fonseca St., Winnipeg, in the province of Manitoba, Canada, there occurred the birth of J. Coppel Borer. Name of father, Isak Borer. Occupation, pedlar. Residence, Winnipeg, Man. Birthplace, not given. Maiden name of mother Mali Weisman.

"This birth is certified to be registered as No. 215 for the year 1892 in the register of the registration division of city of Winnipeg, now on record in the archives of the provincial board of health.

"Given under my hand and seal of the board 16th day of April, 1921.

"[Seal.]

E. N. WOOD.

"Secretary of the Board."

This is all of the evidence presented by the defendant to sustain his contention that the juror Jacob Barer was not a citizen of the United States, except that other affidavits were filed which purport to contain statements made by Jacob Barer relative to the time and place of his birth. To combat these affidavits the respondent filed the affidavit of said juror Jacob Barer, which is to the effect that he did not know his age, stating that he had heard that he was born on the 17th of March, 1892, and had heard that he was born on the 17th of March, 1893, and that he did not know in which year his birth occurred; that he recalled distinctly that at the time

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his father received his final naturalization papers in Walla Walla, Washington, he was under twenty-one years of age; that he and his father talked the matter over, and knew by reason of being under twenty-one years of age he became a citizen of the United States. The affidavit of the father, Isaac Barer, was also filed, and is to the effect that he knew the juror Jacob Barer was born in Winnipeg, Manitoba, on the seventeenth day of March, 1893, and he also refers to the incident of securing his final naturalization papers and to the discussion he then had with his son relative to his son becoming a citizen, and he was then under twenty-one years of age. It appears that Isaac Barer and his wife, the mother of the juror, had not lived together for a period of twenty years, the mother then residing in Los Angeles, California. She also made and filed an affidavit to the effect that her son, Jacob Barer, was born on March 17, 1893, at Winnipeg, Canada. This is all the evidence relating to the citizenship of the juror Jacob Barer. The court found that he was a citizen of the United States, and, in view of the fact that there is not any evidence showing that "I. Coppel Barer," or "J. Coppel Borer," and Jacob Barer is the same person, there is not any evidence that the juror was not a citizen except his own affidavit, which he later explains. It is unnecessary to enter upon any discussion of the law when it affirmatively appears from the facts that the juror was a citizen of the United States at the time he was called.

II. Appellant claims that the jury which tried the defendant [2, 3] was not lawfully summoned and impaneled, and that therefore the verdict was illegal and void for the reason that the jury was summoned at a time when the court had already another jury in attendance, which jury was summoned for the term at which defendant was tried, but not permitted to try him. It appears from the record that on January 24, 1921, an order was made by the court that the names of fifty persons be drawn from jury-box No. 1 to serve as trial jurors for the January, 1921, term, department

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2, to appear in court Monday, February 14, 1921; that the jurors appeared on February 14, 1921, and on that day the court made the following order: "And it appearing to the court that for good cause shown the jurors now in attendance will need to be finally excused at the end of two weeks, it is ordered that the names of fifty persons be drawn from jury-box No. 1 to serve as regular trial jurors for the January, 1921, term, department No. 2, to appear in court Tuesday, March 1, 1921. * * * " The jury originally drawn was finally discharged on February 23, 1921. On March 11, 1921, the following order was made by the court: "It appearing to the court that there is an insufficient number of trial jurors in attendance, it is ordered that the names of fifty persons be drawn from jury-box No. 1 to serve as regular trial jurors for the January, 1921, term, department 2, to appear in court Monday March 21, 1921. * * * " On said March 11, 1921, in the trial of a civil action, the jury panel became exhausted, and it was necessary to draw a special panel from jury-box No. 3 in order to complete the panel in that case.

This case was set for trial on March 21, 1921, and came on for trial on that day. During the progress of the trial it became necessary to draw a special jury from box No. 3, and, later on, during the trial, it became necessary to draw another special jury from box No. 3. It further appears that at the time the special venires were issued in the instant case the panel in attendance was exhausted. The appellant does not contend that the court abused its discretion in the finding made that it was necessary to discharge the original panel at the end of two weeks' service, or in the order of the court discharging such panel on the twenty-third day of February, 1921. The contention seems to be based wholly on the ground that at the time it made the order, on the 14th of February, for the fifty additional jurors, there was already a jury in attendance, and that the court could not lawfully make the order for the second drawing. A hundred and fifty regular

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jurors were drawn under the orders made January 24, February 14, and March 11. The statute (sec. 6348) does not limit the court as to the number of jurors it may draw; hence it was in the power of the court on January 24 to have caused to be issued a venire for the entire 150 jurors, and to have placed them on the payroll of the county when it was known that they would not be needed in the discharge of the duties then before the court. Had this been done the appellant could not complain. How, then, could he be prejudiced by the fact that they were drawn under successive orders, instead of under one order? It appears from the evidence that the crime with which the defendant was charged was alleged to have been committed in the city of Missoula, where the court was held. The court evidently endeavored to secure a jury from the body of the county, instead of making the selection from those who resided in the city wherein it is claimed the crime was committed. The statute does not, in express terms, nor do we think by implication, convey the meaning or impression that the power of a court is exhausted when it has drawn the first jury. If that is its meaning, then the court would be powerless if, for any reason, it became necessary to excuse all the jurors obtained from the original venire, unless a special jury was drawn from box No. 3 for each case tried. The purpose of drawing a jury at all is to enable the court to proceed with the trial of cases. The phrase, "and no jury is in attendance," appearing in the section, means a sufficient number of jurors to transact the business of the court, and if that phrase were not in there at all it would not be presumed that a court would have two independent juries in attendance at the same time. The special juries called were drawn under authority of sections 6357 and 6738, Revised Codes, after the panel then in attendance had been exhausted. A party litigant in neither a civil nor criminal case has any vested right to have his case passed upon by a jury taken from the panel drawn at any certain time. All that he can demand is that

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he have a fair and impartial jury, drawn at the time and in the manner recognized by law. When a jury is so drawn, the parties litigant cannot complain. (*State v. Byrd*, 41 Mont. 585, 111 Pac. 407.) As further elucidating these questions, we cite here *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54; 24 Cyc. 233.

III. The information was filed by leave of court upon this [4-6] application and affidavit of the county attorney and without a hearing before a magistrate; is correctly entitled as to court and cause; contains the name of defendant; was subscribed, verified, and presented to the court by the county attorney; and in its charging part is as follows: "That at the county of Missoula, state of Montana, on or about the twelfth day of February, A. D. 1921, and before the filing of this information, the said defendant then and there being, did then and there willfully, wrongfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought shoot, kill, and murder one Mrs. Jerry Shea, a human being.
* * *

Defendant moved to set aside the information for the reason that he had not been committed by a magistrate, and that not sufficient evidence had been presented to the court to warrant the court in granting leave to file the same. This motion was overruled. A demurrer was then interposed on the grounds that the information was not sufficiently specific, was verified, and did not state a public offense, which demurrer was overruled. A demand for a bill of particulars was then made, which was denied. It appears that the copy of the information delivered to the defendant at the time of his arraignment did not contain the words "a felony" after the phrase "of murder in the first degree," as appears in the information filed. On discovering this fact defendant again moved to quash the information for the reason that a true copy had not been given to him. The court ordered the words inserted in the copy, and overruled the motion. Thereupon defendant again successively moved to quash, demurred, and

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demanded a bill of particulars, all of which were overruled and denied.

The right of the court to grant leave to file an information without previous examination by a committing magistrate is settled law in this state. It is authorized by the Constitution (sec. 8, Art. III), granted by the statute (secs. 9105, 8929), and confirmed by numerous decisions of this court (*State v. Brett*, 16 Mont. 360, 40 Pac. 873; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Little Whirlwind*, 22 Mont. 425, 56 Pac. 820; *State v. Bowser*, 21 Mont. 133, 53 Pac. 179; *State v. Martin*, 29 Mont. 273, 74 Pac. 725).

The facts on which the court acts in granting leave must be satisfactory to the court "whatever may be the form or manner of their presentation." (*State v. Martin, supra.*) The county attorney is a constitutional officer (Art. VIII, sec. 19, Const.), acting under oath, vested with authority, and it is his duty to inquire into alleged violations of law, to institute criminal proceedings, and to represent the state in matters and proceedings in his county (sec. 3052, Rev. Codes), signs all informations (sec. 8921), and may make "application for leave to file an information before an examination, commitment, or admission to bail" (sec. 8928), and when the application, as in this case, is accompanied by an affidavit and the court is satisfied with the report thus made, it may act thereon and grant such leave, although it may require additional information if it so desires. The complaint that the information was verified is without merit. Formerly it was contended that an information must be verified. (*State ex rel. Nolan v. Brantly*, 20 Mont. 173, 50 Pac. 410; *State v. Shafer*, 26 Mont. 11, 66 Pac. 463.)

IV. The words "a felony" were surplusage, and might as well have been stricken from the information. The information states all that is required to be stated by the provisions of sections 9156 and 9157, including the manner in which the offense is alleged to have been committed. (*State v. Stickney*, 29 Mont. 523, 75 Pac. 201; *State v. Crean*, 43 Mont. 47, Ann.

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Cas. 1912C, 424, 114 Pac. 603; *State v. Hliboka*, 31 Mont. 455, 3 Ann. Cas. 934, 78 Pac. 965.) The court did not commit any error in overruling the various motions, demurrers, and demands.

V. During the trial the state called the police magistrate, [7] evidently for the purpose of showing that the defendant had, on the twenty-sixth day of January, 1921, pleaded guilty to a charge of disturbing the peace by committing an assault on the deceased, Mrs. Shea. Objection was made to this evidence on the ground that it was incompetent, irrelevant and immaterial. The previous witness had testified as to difficulty between Mrs. Shea and the defendant on the 25th of January, 1921, about twelve days prior to the homicide. The witness, without objection, also testified as to the details of the assault, stating that the defendant went into the house of Mrs. Shea, brought her and the children out on the porch where he "slapped her, put his thumb in her mouth, rammed her back against a post of the porch," took up the children and with an oath commanded Mrs. Shea to follow him. It was evidently the intention of the state to corroborate the testimony of this previous witness by that of the police magistrate. A lengthy discussion followed by the counsel, and it was finally stipulated that the defendant did, on the twenty-sixth day of January, 1921, enter a plea of guilty to a charge of disturbing the peace by slapping Mrs. Shea. The judgment in the case wherein defendant was accused of disturbing the peace was not offered in evidence, neither was the complaint filed against him, but the prosecution did put in evidence the fact that the defendant pleaded guilty to a charge which included the slapping of Mrs. Shea. The only purpose of such evidence is to show the condition of feeling theretofore existing between the defendant and the deceased, and to this extent the evidence was pertinent and material, and, even if it be conceded that Mrs. Shea was the aggressor at the time of this trouble, the circumstance would nevertheless tend to show the state of feeling existing between them. The plea

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of guilty entered by the defendant would be some evidence tending to show that he and the deceased had had trouble at that time, but the judgment, of course, could not be introduced for the purpose of showing him guilty of the offense of disturbing the peace; neither would the plea of guilty made by the defendant be conclusive upon him in the trial of the instant case. (Jones on Evidence, 2d ed., sec. 589, p. 734; *Doyle v. Gore*, 15 Mont. 212, 38 Pac. 939.)

It has been held by this and other courts that for the purpose of enabling the jury "to inquire what the motive or impulse was which prompted the defendant" to commit the act complained of, evidence of the condition of feeling existing between the deceased and the defendant is pertinent and material. (*State v. Shafer, supra*; 13 R. C. L., sec. 216, pp. 9-12; 21 Cyc. 915; *People v. Colvin*, 118 Cal. 349, 50 Pac. 539.)

The state also called as a witness the chief of police, and put in evidence a conversation had between him and the defendant on the thirty-first day of January, 1921, relative to a state of feeling existing between the defendant and the deceased. In the general conversation that followed, the chief of police advised the defendant not to go around the home of deceased, as it might get him into trouble. This evidence was also objected to; and, while it might well have been left out of the record entirely, it did tend to show that the condition of feeling existing between the parties, testified to by the former witnesses, continued to exist at that time. Independent statements made by the officer, and not a part of the conversation, would have been improper, but the evidence given was apparently a part of the general conversation, and falls under the same general head as that just discussed, and no reversible error was committed in permitting either it or the former testimony to be given in evidence.

VI. The bullet which caused the death of the deceased was [8, 9] extracted from her head and introduced in evidence.

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The bullet was proved to be one from a 32-caliber Colt's automatic pistol. An empty 32-caliber automatic pistol shell was found at the scene of the homicide, and was also introduced in evidence. It had a peculiar crimp or mark at the open end. Loaded shells taken from the defendant at the time of his arrest and fired from the 32-caliber Colt's automatic pistol, which was also taken from the defendant at that time, showed the same peculiar crimp or mark as that appearing on the shell found at the scene of the homicide, while shells taken from the appellant and fired from another pistol of similar make and caliber did not have this peculiar mark upon them. The weight of the bullet taken from the body of the deceased proved to be of the same weight as those used in the pistol taken from the defendant. The rifling marks made by the lands and grooves in the barrel of the pistol were the same. The fact that the bullet taken from the body of the deceased may or may not have been removed secretly does not destroy its evidentiary value. Objection was made to the introduction of this evidence, especially as to the experiments made. It seems to be a well-established rule that it is largely within the discretion of the trial court to permit experiments to be made, and that caution should be exercised in receiving such evidence. It should be admitted only where it is obvious to the court from the nature of the experiments that the jury will be enlightened, rather than confused. Such evidence should not be excluded merely because it is not necessary in establishing the facts sought to be shown by the prosecution, if it tends to corroborate the position taken by the expert witness whose evidence has been received; for whenever the opinion of a person is admitted to be relevant the grounds on which it is based are also relevant. Evidence of experiments made out of court and not in the presence of the jury are admissible upon the same principle as the experiments which are conducted in the jury's presence. Under the circumstances of this case, we find no error in the admission

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of this evidence. This matter may be found fully discussed, with a collection of authorities, in 10 R. C. L., p. 1000 *et seq.*, secs. 187-191. (*State v. Hurst*, 23 Mont. 484, 59 Pac. 911; Jones on Evidence, 2d ed., p. 508, sec. 403 *et seq.*)

VII. Appellant also complains of instructions Nos. 2, 3, 5, 7, 10, 11, 12, 14, 15, 16, 17, 20, 31, 32 and 33, given by the court. These instructions are stock instructions given in homicide cases, and are mostly copies of the statute. No useful purpose would be served by discussing them. It is sufficient to say that they are not open to any objection made to them, and that no error was committed in giving them.

Defendant's offered instruction No. D-6 was fully covered by instructions given, and his offered instruction, No. D-11, is erroneous from any standpoint under the facts in this case.

VIII. The principal ground on which the appellant asked [10] for a new trial is that the evidence is insufficient to warrant a conviction of murder in the first degree. The evidence introduced by the state tends to prove that the social relation between the defendant and the deceased had been very close. On January 25, 1921, trouble existed between the parties to the extent that defendant had slapped the deceased and had used profane language toward her. Between that time and January 31 other trouble had occurred. On February 7 defendant purchased a 32-caliber Colt's automatic pistol, and on February 11 he and the deceased were seen together and quarreling; defendant shaking his fist at her. On February 12 defendant made the threat with reference to the deceased "that he would get her," and applied to the deceased a vile name. The shooting occurred on the evening of February 12, between 7 and 8 o'clock. The defendant and the deceased were seen together at the place of the shooting, and within four minutes thereafter a shot was heard, and defendant was seen running away from that place. At about 4 o'clock on the morning of the 13th of February the defendant appeared at a neighbor's place, apparently much

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excited, and made the statements, "They have got me this time"; "they will give me life and hang me"; also stating that he had been bootlegging. On the sixteenth day of the same month defendant was apprehended and arrested on the Northern Pacific Railroad track about thirty-five miles east of Missoula and traveling east. A 32-Colt's automatic pistol was found in his possession, together with some ammunition therefor. When asked as to how he got there, he replied that he went across the hills. Later he stated that he shot the deceased. The evidence on the part of the defendant does not contradict many of these facts here stated, but is, to some extent, impeaching in character and does raise an issue as to some of the things which the state must necessarily prove. It also appears from the cross-examination of the state's witnesses, and part of the evidence introduced by the defense, that the deceased had received money from the defendant which she had not repaid, but this would not be a justification for the homicide. In certain particulars the facts in this case closely resemble those appearing in the case of *State v. Juhrey, ante*, p. 413, 202 Pac. 762. However, it is a general rule of law that "Threats and misconduct on the part of the deceased toward the defendant, occurring prior to the homicide, form of themselves no justification or excuse for the taking of human life." (*Smith v. State* (Okl. Cr. App.), 174 Pac. 1107.)

The evidence introduced by the state, we believe, is sufficient to sustain this verdict and, where it conflicted with the evidence of the defense, it raised a question for the jury to determine. We have not been able to discover any ground on which the defendant could properly be granted a new trial.

Defendant's specification No. 13, relating to the action of the court in denying his motion for continuance, has not been referred to herein, for the reason that the same is not discussed in appellant's brief. We have examined the record, however, and find that the court did not commit error in denying the motion.

We therefore recommend that the judgment and order be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion the judgment and order are affirmed.

Affirmed.

Rehearing denied January 6, 1922.

LOWNEY, PLAINTIFF AND RESPONDENT, v. BUTTE ELECTRIC RY. CO., APPELLANT.

(No. 4,750).

(Submitted October 28, 1921. Decided December 5, 1921.)

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Personal Injuries — Street Railways — Respondeat Superior — Exoneration of Negligent Employee—Nonliability of Employer—Appeal and Error.

Personal Injuries—Street Railways—Respondeat Superior—Effect of Verdict in Favor of Negligent Employee.

1. Where, in an action for personal injuries against a street-car company and one of its conductors through whose negligence the injuries were alleged to have occurred, the company being charged with liability under the principle of *respondeat superior*, the jury by its verdict exonerated the conductor—the negligent agent—from culpability, its verdict against the company cannot be sustained, since it could not be held negligent unless the agent was.

Same—Disposition of Appeals Under Above Circumstances.

2. Under circumstances such as referred to above, where the judgment in favor of the negligent agent has become final because of failure of plaintiff to appeal from it, a new trial being of no avail, the judgment will be reversed with directions to enter judgment for defendant principal. (See opinion on motion for rehearing.)

Appeals from Silver Bow County; Edwin M. Lamb, Judge.

ACTION by Helen Lowney, by William Lowney, her guardian *ad litem*, against the Butte Electric Railway Company and

1. Effect of servant's discharge from personal liability upon master's liability for servant's act, see notes in 9 Ann. Cas. 660; 21 Ann. Cas. 1013; Ann. Cas. 1915C, 191; 54 L. R. A. 649.

Wilber A. Hoar. From a judgment in favor of plaintiff, and an order denying its motion for a new trial, defendant company appeals. Reversed, with directions to enter judgment in favor of defendant.

Mr. J. L. Templeman, Mr. Sydney Sanner, and Mr. Fred J. Furman, for Appellant, submitted a brief; *Mr. Sanner and Mr. Furman* argued the cause orally.

The conductor was joined as defendant, a verdict as to him was rendered and that verdict is a clear-cut acquittal of the conductor. What can that verdict mean save that the conductor was not negligent? The case is altogether different from those presented in *Verlinda v. Stone & Webster Engineering Co.*, 44 Mont. 223, 119 Pac. 573, *Melzner v. Raven Copper Co.*, 47 Mont. 351, 132 Pac. 552, *De Sandro v. Missoula L. & W. Co.*, 48 Mont. 226, 136 Pac. 711, and *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323, which might be cited as some authority to the contrary.

In none of the above cases was there an explicit verdict exonerating the man whose guilt is indispensable to the responsibility of the company; on the contrary, the supreme court has intimated more or less strongly in all the above cases that such a situation might call for quite a different conclusion than the one announced, and such intimation is in line with all the authorities that have seriously considered the subject. (See *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572; *Morris v. Northwestern Imp. Co.*, 53 Wash. 451, 102 Pac. 402; *Hayes v. Chicago Tel. Co.*, 218 Ill. 414, 2 L. R. A. (n. s.) 764, 75 N. E. 1003; *McGinnis v. Chicago R. I. & P. Ry. Co.*, 200 Mo. 347, 118 Am. St. Rep. 661, 9 Ann. Cas. 656, 9 L. R. A. (n. s.) 880, 98 S. W. 590.)

In any event, whether the verdict acquitting the servant through whose fault alone, and by *respondeat superior*, the company can be held, operates *ipso facto* as an exoneration of the company, it cannot be doubted that it constitutes an adjudication upon the facts, a finding by the jury that the

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evidence was not sufficient to convince them of the guilt of the servant without whose fault the company itself is guiltless. There is no question of defective appliance here, no dangerous instrumentality, no duty of primary care on the master. The company was negligent only if Hoar was negligent; his negligence was a condition precedent to any liability of the company. The jury declared Hoar not negligent. That absolves the company.

Mr. N. A. Roterling and *Mr. Wm. Meyer*, for Respondent, submitted a brief and argued the cause orally.

Counsel for appellant contend that the jury having found in favor of the conductor, thereby exonerating him from any liability, the company thereby also becomes exonerated. It is somewhat peculiar that the very authorities upon which counsel rely to sustain their contention in this regard are the cases wherein our supreme court has held directly to the contrary. The question is a closed one in this state and no longer open to argument. (*Verlinda v. Stone & Webster Engineering Corp.*, 44 Mont. 223, 119 Pac. 573.)

As was said in the above case, it was not necessary to join the defendant Hoar as a party to this action; plaintiff might have elected to proceed against the company alone and the complaint would have stated a cause of action against the company. Under these circumstances it certainly cannot be held that the capricious finding of the jury exonerating Hoar should result in a reversal of the judgment against the company and a denial to the plaintiff of relief to which she is justly entitled. (See, also, *Golden v. Northern Pac. Ry. Co.*, 39 Mont. 435, 18 Ann. Cas. 886, 34 L. R. A. (n. s.) 1154, 104 Pac. 549.)

We also call the court's attention to the fact that the case of *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572, cited by counsel in their brief as sustaining their contention, was expressly disapproved in the *Verlinda Case*. That the question here presented is not any longer open to argument

in this state must be further conceded when the case of *De Sandro v. Missoula, L. & W. Co.*, 48 Mont. 226, 136 Pac. 711, is read. This case, decided long after the *Verlinda Case*, deals with the identical proposition presented in the case at bar. In the *De Sandro Case* the agent of the company, who had active charge of the work in which the plaintiff was injured, was made a defendant. The jury found for him but found against his employer. The same contention was raised in that case as is presented here, but the court in finding adversely to such contention used the following language: "But we think the formal acquittal of the servant or agent through whose wrong the injury was done should not deprive the plaintiff of what the jury has given him, if the evidence shows that he has suffered wrong."

After expressly disapproving the cases of *Doremus v. Root*, *Morris v. Northwestern Imp. Co.*, and *Hayes v. Chicago Tel. Co.*, cited in brief of counsel for the company, our supreme court says: "This doctrine might not be strictly logical, but it is equally as logical as that announced in the cases cited; for under the rule followed by them, the plaintiff is deprived of right of recovery on purely technical grounds."

In view of the above we submit that the finding of the jury in favor of the defendant Hoar cannot be held to operate as an acquittal of the defendant company. As was so well stated by our supreme court in the *Verlinda Case*, the reasons which prompt juries to do peculiar things and render peculiar verdicts are many; and so in this case, out of friendship for defendant Hoar, although knowing him to have been negligent, they nevertheless found a verdict in his favor. Should it then be said that because of that fact the plaintiff, a child four years of age, rendered a cripple for life, should be held responsible for the eccentricities and peculiar reasoning which influenced the jury in this case to render a verdict in favor of the defendant Hoar? Logic and justice, right and reason, demand that no such harsh rule be invoked against

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this plaintiff and that the former decisions of our supreme court be adhered to.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

This action was brought by William Lowney, guardian *ad litem* for Helen Lowney, a minor, against the Butte Electric Railway Company, a corporation, and Wilber A. Hoar, to recover damages for personal injuries. Verdict was rendered in favor of defendant Hoar but against defendant Butte Electric Railway Company and judgment was entered in accordance with the verdicts. Defendant Butte Electric Railway Company made a motion for a new trial, which was overruled. It has appealed from the order overruling the motion and from the judgment. No appeal was taken by plaintiff from the judgment in favor of Hoar.

The facts as alleged in the complaint and as contended by plaintiff were substantially as follows: Helen Lowney, at the time in question, was a child approximately four years of age. Her mother, with her and two other children, were passengers on one of the cars of the defendant railway company of which defendant Hoar was conductor. Upon reaching their destination, the mother assisted the other two children to alight from the car while the conductor put his arm around Helen to lift her from the car to the pavement, when he carelessly and negligently let her drop, the back of her head striking the iron rim of the car step, causing severe injuries.

The railway company can be held liable in this action only [1] upon the principle of *respondeat superior* as no other negligence is charged than that of the conductor letting the child fall. By reason of these circumstances, appellant contends that it cannot be held liable to plaintiff unless defendant Hoar, who was the negligent agent, is also held liable; but the jury, by its verdict, exonerated defendant Hoar, while finding against the defendant company. There can be no question but that the two verdicts are inconsistent for the finding by the jury

which will support one verdict would make the other one impossible. A different case would be presented if both defendants were primarily charged with negligence and one was not charged solely under the rule of *respondeat superior*. In such a case the liability of one does not depend upon the negligence of the other but each one is primarily liable for the negligence of which he himself was guilty in whole or in part. In such case the verdict against one is not dependent in any way upon the verdict against the other, but in this case the railway company cannot legally be liable unless Hoar was likewise liable. The difficulty, however, in applying that rule of liability to this case, lies in the fact that it is impossible for this court to say whether the jury found in good faith that Hoar was free of negligence but capriciously rendered a verdict against the defendant company, or in good faith rendered its verdict against the defendant company based upon the negligence of Hoar but capriciously exonerated him. The authorities outside of this state are divided upon the proposition as to whether or not, under the circumstances, the judgment against the principal shall stand, but it seems to us that the weight of authority is to the effect that when the servant, through whom the negligence occurred and by which only the master can be held liable, is exonerated by the verdict of the jury, such exoneration inures to the benefit of his principal, and that therefore a verdict against the latter under such circumstances cannot be sustained. The leading authorities so holding are as follows: 18 R. C. L., Master and Servant, par. 236; *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572; *Southern Ry. Co. v. Harbin*, 135 Ga. 122, 21 Ann. Cas. 1011, 30 L. R. A. (n. s.) 404, 68 S. E. 1103; *Bradley v. Rosenthal*, 154 Cal. 420, 129 Am. St. Rep. 171, 97 Pac. 875; *McGinnis v. Chicago etc. Ry. Co.*, 200 Mo. 347, 118 Am. St. Rep. 661, 9 Ann. Cas. 656, 9 L. R. A. (n. s.) 880, 98 S. W. 590; *Morris v. Northwestern Improvement Co.*, 53 Wash. 451, 102 Pac. 402; *Sipes v. Puget Sound Electric Ry.*, 54 Wash. 47, 102 Pac. 1057; *Fimple v. Southern Pacific Co.*, 38 Cal. App.

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727, 177 Pac. 871; *Hayes v. Chicago Telephone Co.*, 218 Ill. 414, 2 L. R. A. (n. s.) 764, 75 N. E. 1003; *Republic Iron & Steel Co. v. Lee*, 227 Ill. 246, 81 N. E. 411; *Chicago, St. P. M. & O. Ry. Co. v. McManigal*, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243; *Stevick v. Northern Pac. Ry. Co.*, 39 Wash. 501, 81 Pac. 999; *Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co.*, 165 Ind. 361, 75 N. E. 649. The leading authorities holding to the contrary are as follows: 18 R. C. L., Master and Servant, par. 236; *Illinois Cent. Ry. Co. v. Murphy's Admr.*, 123 Ky. 787, 11 L. R. A. (n. s.) 352, 97 S. W. 729; *Broadway Coal Min. Co. v. Robinson*, 150 Ky. 707, 150 S. W. 1000; *Illinois Cent. R. Co. v. Outland's Admx.*, 160 Ky. 714, 170 S. W. 48; *Carson v. Southern Ry. Co.*, 68 S. C. 55, 46 S. E. 525; *Texas & P. Ry. Co. v. Huber* (Tex. Civ.), 95 S. W. 568; *Bedenbaugh v. Southern Ry. Co.*, 69 S. C. 1, 48 S. E. 53.

It must also be borne in mind that where the principal is held liable under the rule of *respondeat superior*, he has the right of action against the servant for the damages he has sustained by reason of the servant's negligence. In this case, if the judgment against the railway company is to be sustained, while the judgment in favor of Hoar remains as a final determination that he was not negligent, then the latter judgment constitutes a bar to any action by the railway company to recover its damages against Hoar. Thus, the principal is charged with the liability for the act of the servant but is denied the right to compel the servant to account for the damages due to his wrongful act. This in itself is a substantial reason why the railway company should not be held liable for the damages unless Hoar is also held responsible.

In opposition to appellant's contention, respondent relies upon the decisions of this court found in the cases of *Verlinda v. Stone & Webster Engineering Corp.*, 44 Mont. 223, 119 Pac. 573, and *De Sandro v. Missoula L. & W. Co.*, 48 Mont. 226, 136 Pac. 711. It is true that in both opinions appear *dicta* supporting respondent's theory of the case, but

it is elementary that such expressions not necessary to the determination of the issues involved are not binding upon the court. Each of those cases can be distinguished from the one at bar and therefore does not present a precedent establishing the law in this state. In the *Verlinda Case* there was involved the charge of negligence in the matter of the selection of a derrick hook, it being claimed that Wallace was the agent through whom the negligence occurred. As this court said in that case, "the action of the jury is therefore clear if, as was probably the fact, it be assumed that the jury found that the company was negligent in the performance of its primary duty to furnish a reasonably safe appliance, and could not agree as to whether Wallace was negligent in the selection of the mode of its use." In other words, in that case the jury could find that the company was guilty of negligence without finding that Wallace was so guilty. In the *Verlinda Case*, no verdict was rendered as to the individual defendant, which was construed as no verdict at all as to him, while in this case there was a verdict expressly finding in favor of defendant Hoar. In the *De Sandro Case*, plaintiff was injured by the caving in of a trench in which he was working. The work was being done for the defendant company by Odenwald and Hadalin as agents of the company. Hadalin was made a party defendant in the action but Odenwald was not. As the jury may have concluded that Odenwald was the one guilty of negligence instead of Hadalin, it did not appear that the defendant's liability was absolutely dependent upon the negligence of the defendant Hadalin. These distinguishing features prevent these two cases from having any controlling effect upon the case involved here.

As one of the vital issues in the case was whether or not [2] defendant Hoar was guilty of negligence, it follows that the verdict against the railway company could have been based reasonably only upon the finding that Hoar was negligent, while, on the contrary, a verdict in favor of Hoar could be based reasonably only upon the finding that he was not negli-

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gent. The case presents a situation somewhat analogous to that which is presented when the trial court, sitting without a jury, has made inconsistent findings. It is the universal practice of appellate courts in such cases to reverse the judgment entered upon such inconsistent findings and remand the case to the trial court for a new trial. Such proceeding is the only logical course, inasmuch as by reason of the conflicting findings, the appellate court is wholly unable to determine whether or not the judgment was rightly entered. In this case, the court is equally unable to determine which verdict, based upon findings inconsistent with those that support the other verdict, was right. Unquestionably, one was wrong, but as we are unable to go behind the verdicts and read the minds of the jurors, we cannot determine which was wrong; but we do know that it is logically impossible in this case for the defendant company to be liable in damages to plaintiff while defendant Hoar is not. If an appeal had been taken by plaintiff from the judgment in favor of Hoar whereby this court would have jurisdiction to consider the whole case and act upon both judgments, it might remedy the wrong done due to the return of the inconsistent verdicts, by holding that there was a mistrial and sending the case back for a new trial. However, plaintiff has not taken an appeal from the judgment in favor of Hoar, by reason of which that judgment has become final. We cannot reverse that judgment because it is not before us, and therefore it must be deemed established beyond any further controversy that Hoar was not guilty of negligence. Under this state of the record, this court is powerless to correct the incongruous situation by sending the case back for a new trial whereby the issue of negligence as to both defendants can be determined definitely. With the judgment in favor of defendant Hoar a valid and subsisting judgment, a new trial would leave the parties in exactly the same situation in which they are at the present time and therefore would be of no avail. The only logical course is for this court to hold that the judgment against the defend-

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ant railway company must be set aside for the reason that it is not supported by the finding of the jury as expressed in its verdict directly exonerating Hoar.

Other assignments of error were made by appellant, but inasmuch as they are not necessary to the final determination of the case, they will not be considered.

The order overruling the motion for new trial is reversed.

For the reasons herein stated, the judgment is reversed and the cause remanded to the district court, with directions to enter judgment in favor of defendant railway company.

Reversed with directions.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

Petition for rehearing denied January 30, 1922.

ASSOCIATE JUSTICES REYNOLDS and COOPER: Our attention has been called to the fact that regarding the judgment in favor of defendant Hoar, plaintiff made a motion for new trial in the district court, which motion is still pending. Under these circumstances, it yet may be possible for the case to be retried and a decision rendered upon the merits, and for this reason it seems to us advisable to send the case back for a new trial. Such course was adopted in most of the cases upon which our decision of this case was based, is consistent with our opinion already rendered and is in accordance with justice as between the parties.

It is therefore our opinion that the order heretofore entered in said matter should be modified by striking out that portion thereof which directs the entry of judgment in favor of defendant railway company, and in lieu thereof it be ordered that the cause be sent back to the district court for a new trial.

HEAVILIN, APPELLANT, v. D. J. O'CONNOR ET AL., RE-
SPONDENTS.

(No. 4,504.)

(Submitted November 7, 1921. Decided December 5, 1921.)

[202 Pac. 1115.]

*Quieting Title—Cancellation of Instruments—Cloud upon Title
—Complaint—Insufficiency.*

1. In an action to cancel instruments claimed to constitute clouds upon the title to mining property, thus preventing plaintiff from obtaining a bidder upon execution sale under a judgment in a mechanic's lien foreclosure proceeding, complaint *held* insufficient to state a cause of action under sections 6115 and 6116, Revised Codes (conceding, but not deciding, that the action could be maintained under those sections), for failure to allege the facts showing the apparent validity of the instruments claimed to constitute clouds as well as the facts showing their invalidity.

Appeals from District Court, Granite County; Theo. Lentz, Judge.

ACTION against D. J. O'Connor, substituted for the Henderson Mining Company, and others, to remove clouds upon the title to mining claims to enable him to obtain bidders on execution sale under a judgment in a mechanic's lien foreclosure proceeding. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Affirmed.

Mr. S. P. Wilson and *Mr. J. J. McDonald*, for Appellant, submitted a brief.

As stated in the case of *Hicks v. Rupp*, 49 Mont. 40, the test in an action of this kind is whether the instrument against which relief is asked may apparently be valid, and, if left outstanding, such as will constitute a menace or injury to the person who complains of it, and against whom it is void or voidable. Quoting from *Hibernia Sav. & Loan Soc. v. Ordway*, 38 Cal. 679, 681, this court says that the complaint must show the apparent validity of the instrument and also additional

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facts showing its invalidity, and must further show that but for the interposition of the court the plaintiff may suffer injury. Plaintiff's complaint conforms to the rule set forth in this case, and plaintiff's testimony fully sustains the allegations of his complaint. The case of *Rosenbaum v. Foss*, 4 S. D. 184, 56 N. W. 114 is illustrative of the relief that will be granted under a statute identical with our section 6115. (See, also, *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048; *Magnuson v. Clithero*, 101 Wis. 551, 77 N. W. 882; *Wiard v. Brown*, 59 Cal. 194.)

Mr. Wingfield L. Brown, Mr. D. M. Durfee, Mr. R. Lewis Brown and Messrs. Maury & Melzner, for Respondents, submitted a brief; *Mr. H. L. Maury* argued the cause orally.

At the trial it was suggested that in order for the plaintiff to recover, or in order for him to secure a judgment in his favor, he must succeed on the strength of his own title and not on the weakness of his adversaries. Assuming this to be the law, it is quite evident that the plaintiff in his complaint nowhere presumes to allege that he is the owner of either the legal or equitable title in controversy, and if he has no title he must be treated as a stranger to the suit, and the objection to the introduction of evidence should have been sustained.

Cases from our neighboring states, whose statutes are practically identical, have not seen fit to change a doctrine so well established and so soundly equitable. (*Hardinge v. Empire Zinc Co.*, 17 Ariz. 75, 148 Pac. 306; *Magneson v. Pacific Mfg. Co.*, 26 Cal. App. 52, 146 Pac. 69; *Washington State Sugar Co. v. Goodrich*, 27 Idaho, 26, 147 Pac. 1073; *Elwert v. Reid*, 70 Or. 318, 139 Pac. 918, 141 Pac. 540; *City of Spokane v. Security Sav. Soc.*, 82 Wash. 91, 143 Pac. 435; *Daly v. Lahontan Mines Co.*, 39 Nev. 14, 151 Pac. 514, 158 Pac. 285; *Holthoff v. Freudenthal*, 22 N. M. 377, 162 Pac. 173; *Sears v. Willard*, 165 Cal. 12, 130 Pac. 869; *Johnson v. Gibson*, 24 Colo. App. 392,

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133 Pac. 1052; *Brown v. Bremerton*, 69 Wash. 474, 125 Pac. 785.)

A lien is not a title, and presuming for the moment that the plaintiff did have a lien upon the property in question, it is not an estate or interest in land sufficient, under a statute similar to ours, as would warrant an action to determine an adverse claim. (*Turrell v. Warren*, 25 Minn. 9.) All the plaintiff seems to own here is a sort of cloud that might be removed by the real owner of the ground, if they considered it of sufficient importance to embarrass them. (*Spar Consol. Min. Co. v. Casserleigh*, 34 Colo. 454, 83 Pac. 1058.)

MR. COMMISSIONER SPENCER prepared the opinion for the court.

This is an action by plaintiff for the cancellation of certain judgments, certificates of sale on execution, and deeds described in the complaint and claimed to constitute clouds upon the title to mining claims alleged to be owned by Henderson Mining Company. From a judgment for defendants and an order denying a new trial, plaintiff appeals.

As a basis for his action, plaintiff details in the complaint all proceedings had in a cause commenced in the district court of the third judicial district for Granite county, which resulted in the entry of a judgment in his favor and against Henderson Mining Company, a corporation, on June 30, 1916. By virtue of this judgment plaintiff asserts a lien upon what is known as "the Henderson Mine," which comprises four claims designated as "Queen," "Maud S.," "Sunol," and "Toe Calk" quartz lode mining claims. The plaintiff has then attempted to allege facts disclosing claims by the various defendants, constituting clouds upon the title of the Henderson Mining Company, which he alleges is the true owner of the property against which he seeks to enforce payment of his judgment lien, and contends that by reason of these alleged facts he is prevented from securing a bidder upon execution sale, and alleges that he is thereby in effect denied the right

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of foreclosure under that lien. All defendants appeared, Horn, Brown, Chas. D. McClure, Clara E. McClure, W. R. McClure, and Chas. D. McClure, Jr., disclaiming any right, title, or interest whatsoever in the property involved, Henderson Mining Company answering that it has been dissolved as a corporation, all of its property sold, and generally denying the allegations of the complaint; and the defendant Scott and Pan Metallic Company setting up superior right and title to that claimed by the plaintiff. Superiority of defendant Scott's lien is conceded, and the only active defense is by Pan Metallic Company. Jury was waived by all parties, and trial had to the court, culminating in judgment for the defendants for their costs, the court holding that the complaint did not state facts sufficient to constitute a cause of action. Whether or not that ruling is correct is the only question necessary to a determination of these appeals.

Plaintiff invokes the provisions of sections 6115 and 6116, Revised Codes, in support of his right of action and method of procedure. These sections are:

"6115. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled.

"6116. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury within the provisions of the last section."

Conceding, without deciding, that plaintiff may maintain his [1] action under authority of the statutes just quoted, the correctness of the decision of the court below is patent upon the face of the complaint, because it alleges that the claim of Pan Metallic Company is based upon a deed from Clara E. and Chas. D. McClure, and that they had no title at the time the deed was executed (which is a mere conclusion of the

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pleader), but fails to state whether the deed was dated or recorded prior or subsequent to the date of the judgment lien, and thereby fails to disclose some of the elements necessary to constitute the cloud. Approval of the principle that the facts showing the apparent validity of the instrument claimed to constitute the cloud, as well as the facts showing its invalidity, must be pleaded, is found in *Hicks v. Rupp*, 49 Mont. 40, 140 Pac. 97, and cases cited. Hence it follows that, unless the complaint discloses facts in accordance with this rule, there is a fatal omission in the pleading, and the plaintiff, having failed to comply with these requirements as to the Pan Metallic Company, has not stated a cause of action, and cannot prevail against it. Because of the absence of essential elements the complaint is insufficient as to the several defendants McClure, Horn and Brown, but by reason of their disclaimer of any right, title or interest in the property involved herein, the plaintiff is entitled to no affirmative relief against them, and further discussion of the pleading as to their asserted claims is unnecessary.

We find no error in the record, and therefore recommend that the judgment and order be affirmed.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order are affirmed.

Affirmed.

Rehearing denied January 7, 1922.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1921,

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. FRANK B. REYNOLDS, THE HON. CHARLES H. COOPER, THE HON. WILLIAM L. HOLLOWAY, THE HON. ALBERT J. GALEN,	}	Associate Justices.
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**BECKMAN, RESPONDENT, v. NATIONAL COUNCIL OF
KNIGHTS & LADIES OF SECURITY, APPELLANT.**

(No. 4,559.)

(Submitted November 2, 1921. Decided December 7, 1921.)

[204 Pac. 487.]

*Life Insurance—Application—False Answers—Breach of War-
ranties—Policy Void.*

1. Where the answers to questions in an application for life insurance were by the policy made warranties, and the applicant in reply thereto stated that she had not been treated by or consulted a physician within the past five years and that she had not undergone an operation for appendicitis, whereas the evidence showed that she had been treated by a physician on many occasions within that time and had been operated on for appendicitis, the policy was void, and the trial court erred in refusing to grant defendant's motion for a directed verdict.

1. Misrepresentation by insured as avoiding life insurance policy, see note in **Ann. Cas.** 1915A, 460.

When may statements be regarded as representations, although expressly denominated in policy as warranties, see note in 11 **L. R. A.** (n. s.) 981.

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Appeals from District Court, Deer Lodge County; George B. Winston, Judge.

ACTION by Nels Beckman against the National Council of Knights & Ladies of Security. Judgment for plaintiff, and from it and an order refusing it a new trial defendant appeals. Reversed, with direction to enter judgment for defendant.

Mr. Chas. E. Avery, for Appellant, submitted an original and a supplemental brief and argued the cause orally.

Where a material false representation or breach of warranty is shown by the uncontradicted evidence, and no waiver thereof by the insurer is proved, a nonsuit should be granted or a verdict directed for defendant. (25 Cyc. 951.) "If the truth of the statements made in application for insurance is warranted its falsity will avoid the policy though not material." (*Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498.) "Where the insured applying for life insurance in his application forming a part of the policy falsely answered that he had not been treated for alcoholism, the false answer is material to the risk and avoided the policy." (*Doherty v. Mutual Life Ins. Co.*, 166 N. Y. Supp. 838. Also see *Metropolitan Life Ins. Co. v. Jennings*, 130 Md. 622, 101 Atl. 608; *Metropolitan Life Ins. Co. v. Schmidt*, 29 Ky. Law Rep. 255, 93 S. W. 1055.)

Mr. John W. James, for Respondent, submitted a brief and argued the cause orally.

Statements like those made by the insured in this case are facts held to be representations and not warranties. (*Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Supreme Lodge Knights of Pythias v. Edwards*, 15 Ind. App. 524, 41 N. E. 850; *Northwestern Mutual Life Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189; *Miller v. Mutual Ben. Life Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122; *Anders v.*

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Supreme Lodge Knights of Honor, 51 N. J. L. 175, 17 Atl. 119; *Northwestern Benevolent & Mut. Aid Assn. v. Cain*, 21 Ill. App. 471; *Modern Woodman Accident Assn. v. Shryock*, 54 Neb. 250, 39 L. R. A. 826, 74 N. W. 607.) Courts will never construe language to mean a warranty unless it is so clear as to preclude any other construction. (*Spencer v. Central Acc. Ins. Co.*, 236 Ill. 444, 19 L. R. A. (n. s.) 88, 86 N. E. 104.) The language must be clear and unambiguous. (*Metropolitan L. Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785.) Statements made in good faith and on the best information had and obtainable will not vitiate a policy, if incorrect and not willfully untrue. (*Supreme Lodge Knights of Honor v. Dickson*, 102 Tenn. 255, 52 S. W. 862.) The strong inclination of the courts is to make statements or answers of the insured binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary. (*Moulton v. American Life Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447, 4 Sup. Ct. Rep. 446; *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563 [see, also, Rose's U. S. Notes]; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Fowler v. Aetna F. Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; *Piedmont etc. Ins. Co. v. Young*, 58 Ala. 476, 29 Am. Rep. 770; *Parsons' Contracts*, 465; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.) While the authorities are not in harmony on this proposition, we are of the opinion that the correct rule applicable to questions of this character is that the disorder, to constitute a breach of warranty, must be of a substantial nature, and not a mere temporary functional indisposition. (*Standard Life etc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105; *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610; *Modern Woodmen v. Wilson*, 76 Neb. 344, 107 N. W. 568; *Franklin L. Ins. Co. v. Galligan*, 71 Ark. 295, 100 Am. St. Rep. 73, 73 S. W. 102;

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Blumenthal v. Berkshire L. Ins. Co., 134 Mich. 216, 104 Am. St. Rep. 604, 96 N. W. 17; *McCollum v. New York Mut. L. Ins. Co.*, 124 N. Y. 642, 27 N. E. 412; *Woodward v. Iowa Life Ins. Co.*, 104 Tenn. 49, 56 S. W. 1020; *Billings v. Metropolitan L. Ins. Co.*, 70 Vt. 477, 41 Atl. 516.) An occasional call on a physician who found no serious ailment is not proof of a false answer. (*Mutual Reserve L. Ins. Co. v. Dobler*, 137 Fed. 550, 70 C. C. A. 134.) Nor is the prescribing twice for indigestion a showing of bad faith. (*Fidelity M. Life Assn. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197.) We understand it to be a question for the jury to determine whether the facts which appear in evidence are so far inconsistent with the answers relied upon in the application as to establish a material misrepresentation. (*Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, 135.)

MR. COMMISSIONER JACKSON prepared the opinion for the court.

On February 23, 1917, at Anaconda, Montana, Carrie M. Beckman had issued to her by the National Council of Knights & Ladies of Security, a Kansas City corporation, a beneficiary certificate on her life in the sum of \$2,000.

By the terms of the certificate defendant agreed, upon the death of Carrie M. Beckman, to pay to Nels Beckman, the beneficiary, a sum of \$2,000, providing that in case the insured died within six months after delivery of the certificate the defendant would pay to the beneficiary sixty per cent of the face of the policy, viz., \$1,200.

Carrie M. Beckman died on May 31, 1917, and the defendant refused to pay any sum to the plaintiff, whereupon plaintiff brought this action for the recovery of \$1,200, with interest from June 15, 1917, the date upon which he duly and regularly made his claim.

Defendant sought to avoid liability on the ground that certain answers contained in the medical examination were untrue. The case was tried to a jury which returned a verdict for

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plaintiff. From the judgment and an order denying a new trial defendant appeals.

Several assignments of error are set forth, but it is not necessary for a full determination of the case to consider any except the refusal of the court to grant defendant's motion for a directed verdict.

The entire proof showed that when Carrie M. Beckman made [1] her application for membership she underwent a medical examination. Among other answers to questions in her application, she stated: "That I have not now and never have had and no physician has ever treated me for or advised or informed me that I had any of the following named diseases * * * appendicitis * * * ." The following questions, answered by the insured, also appear: "Have you either consulted or been treated by any physician or surgeon within the past five years for any illness, disease or injury?" "No." "Have you undergone any surgical operation or have you any bodily malformation or weakness?" "No."

In her application, Mrs. Beckman made the following statement: "I hereby make application for a beneficiary certificate from the National Council of Knights and Ladies of Security. And I hereby declare that the foregoing answers and statements are true, full and correct, and I acknowledge and agree that the said answers and statements, with this application, shall form the basis of my agreement with the Order, and constitute a warranty. I hereby make my medical examination a part of this application and agree that this application and medical examination shall be considered a part of my beneficiary certificate and together with the constitution and laws of the society as now existing or hereafter amended shall constitute my contract with the society."

The beneficiary certificate, upon which this action is based, provides as follows: "This Beneficiary Certificate is issued by said National Council and accepted by the member only upon the following express warranties, conditions and agreements.

"1. That the application for membership in this Order,

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made by the said member, together with the report of the medical examiner, which is on file in the office of the National Secretary, and both of which are made a part hereof, are true in all respects, and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of the Order to said member, or said member's beneficiaries, the same as if fully set forth in this certificate and that the application and medical examination herein referred to and the constitution and laws of the society as the same now exist or as may be hereafter enacted, and this Beneficiary Certificate shall all be construed together as forming parts of the contract between the National Council and the member.

"2. That if said application and medical examination shall not be true in each and every part thereof, then this Beneficiary Certificate shall as to said member, or said member's beneficiary, be absolutely null and void.

"3. This Certificate is issued in consideration of the warranties and agreements made by the person named in this Certificate in said member's application to become a member of this order and in said member's medical examination, and also in consideration of the payments made when initiated as a member, the said member's agreement to pay all assessments and dues to become due during the time said member shall remain a member of this order, in the manner prescribed in the Laws of the Order."

There can be no question but that the application forms part of the benefit certificate and that express warranties as part consideration for the issuing of the certificate were made by the insured. If these warranties were in fact not true, there is no liability on the part of the defendant.

Mrs. Beckman had by undisputed testimony been treated by a physician on many occasions during the five years immediately preceding her medical examination. She had also been operated on for appendicitis; therefore the facts she warranted as being true in her application were in reality not true.

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A life insurance risk is always based on the physical condition of the insured. This condition must necessarily depend in large measure upon physical history which comes to the examiner by the statements of the applicant. The insurance company may conclude to decline the risk and in order to act intelligently in this respect it is entitled to know as a matter of right what has been the true physical history.

The motion for a directed verdict should have been granted.

In the case of *Mandoli v. National Council of Knights & Ladies of Security*, 58 Mont. 671, 194 Pac. 493, Mr. Justice Cooper has expounded the law of this state on the identical question involved here. It is really a companion to the instant case and fully determinative of its merits, so that further discussion and analysis are superfluous here.

For the reasons herein stated we recommend that the judgment and order be reversed and the cause remanded to the district court, with directions to enter judgment for the defendant.

PER CURIAM: For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded to the district court, with directions to enter judgment for the defendant.

ROHAN, RESPONDENT, v. SHERMAN & REED ET AL., APPELLANTS.

(No. 4,536.)

(Submitted November 2, 1921. Decided December 7, 1921.)

[202 Pac. 749.]

*Automobiles—Master and Servant—Negligence of Servant—Liability of Master—Statutes—Instructions.**Automobiles—Master and Servant—Negligence of Driver—Liability of Master—Instruction.*

1. In an action for damages to plaintiff's automobile in a collision with defendant company's taxicab, an instruction based on the admission that its driver's acts were within the scope of his employment, that the company was liable for his negligent acts, *held* not erroneous as assuming negligence on the part of the driver, especially where in other instructions the extent of defendant's responsibility was made clear.

Trial—Instructions—Ambiguity in Particular Instruction—When not Reversible Error.

2. Where the charge to the jury as a whole leaves no doubt as to the correct principles of law applicable, ambiguity in a particular instruction given is not ground for reversal.

Automobiles—Owner Liable for Damage Done by Employee—Statute.

3. Under section 5, sub-chapter 8, of Chapter 141, Laws of 1915, the owner of a vehicle employed for the conveyance of passengers is liable for all damage done by a driver in his employ to person or property while acting within the scope of his employment.

Appeals from District Court, Silver Bow County; Edwin M. Lamb, Judge.

ACTION by Frank Rohan against Sherman & Reed, a corporation, and another. Judgment for the plaintiff, and defendants appeal from the judgment and from the order denying their motion for a new trial. Affirmed.

Messrs. Maury & Melzner and *Messrs. Napton & Shone*, for Appellant, submitted a brief; *Mr. A. G. Shone* argued the cause orally.

The latter part of instruction No. 5 directs the jury to find for the plaintiff as to negligence of the defendant, a corporation. It deems that the defendant Earle Hutchinson had

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been guilty of some negligent act and that the jury should hold the corporation liable for this act. The instruction is not complete, for the reason that the corporation is not liable for acts done willfully or negligently or otherwise by the defendant Earle Hutchinson, unless done in the course of his employment and within its scope. (*Jackson v. St. Louis etc. R. Co.*, 87 Mo. 422, 56 Am. Rep. 460; *Thorburn v. Smith*, 10 Wash. 479, 39 Pac. 124; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Rounds v. Delaware etc. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Evansville etc. R. Co. v. Baum*, 26 Ind. 70.)

Mr. T. J. Davis, Mr. Leslie B. Sulgrove and Mr. Earle N. Genzberger, for Respondent, submitted a brief; *Mr. Davis* argued the cause orally.

The question whether or not the acts complained of were without the scope of Hutchinson's employment was not raised at the trial and was not put in controversy by the pleadings nor by the testimony, "and error cannot be predicated upon the refusal of the court to give an instruction which is not material to the issues or evidence." (*Lindsay v. Kroeger*, 37 Mont. 231, 95 Pac. 839; *Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055; *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 30 L. R. A. 803, 42 Pac. 273.) Instruction No. 5 was drawn upon the theory that it was admitted that the acts were within the scope and course of Hutchinson's employment, and was therefore proper. (*Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969.) If incomplete, it was appellant's duty to offer the instruction they desired. (*Hollenback v. Stone & Webster Eng. Corp.*, 46 Mont. 559, 129 Pac. 1058.)

MR. JUSTICE GALEN delivered the opinion of the court.

In this case it appears that the defendant Sherman & Reed, a Montana corporation, is engaged in the taxicab business in the city of Butte, and that the defendant Earle Hutchinson was in the employ of the defendant corporation as a chauffeur or driver of one of its taxicabs. On December 24, 1916, the

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plaintiff was the owner of a certain automobile, and was carefully and lawfully driving it, in the conduct of his business as a taxicab driver for the carriage of passengers for hire, on Harrison Avenue, in the city of Butte, and while then and there attempting to pass a motor vehicle belonging to the defendant corporation, operated by the defendant Hutchinson within the scope of his employment, the defendant corporation's taxicab was carelessly, recklessly and negligently backed, without warning, at a fast rate of speed, and collided with plaintiff's car, causing damage thereto. Plaintiff by his complaint sought to recover \$400 as damages to his automobile, and a like amount by reason of loss of earnings. On motion, damages alleged in consequence of loss of profits was stricken from plaintiff's complaint. Issue being joined, trial was had before the court sitting with a jury, and upon verdict of the jury judgment was entered against the defendants for the sum of \$400. The appeal is from the judgment and order denying the defendant's motion for a new trial.

The only error assigned is the giving to the jury of plaintiff's offered instruction numbered 5, as follows: "You are instructed that the defendants admit in their answer that Earle Hutchinson was in the employ of the defendant company, as set forth in the plaintiff's complaint, and you are further instructed that the defendants admit that the defendant company is the owner of many motor vehicles, and therewith engaged in carrying passengers for hire.

"You are further instructed that Sherman & Reed, a corporation, is liable for any negligent acts or omissions of the said Earle Hutchinson, causing damage to person or property done by the said Earle Hutchinson in his employment as a driver, while driving a motor vehicle, whether done willfully or negligently or otherwise in the same manner as said driver would be liable."

It is argued that this instruction is erroneous, as it directs the jury to find for the plaintiff as respects the negligence of the defendant corporation, assuming its employee guilty of

negligence. This contention is without merit. It does not, as contended, assume negligence on the part of the servant. The language used is that the defendant corporation "is liable for any negligent acts or omissions" of its servants, causing damage to plaintiff. If there were no negligent acts or omissions causing damages to plaintiff proved, then of course, the defendant corporation would not be held responsible the same as the driver or otherwise. This instruction is unobjectionable, and more particularly so since the instructions, given as a whole, left no possible ambiguity in its application.

If any ambiguity may be said to exist in consequence of the language used in this instruction, the correct principle of law applicable to the defendant corporation's responsibility was made clear by other instructions given.

In instruction 1D, the jury was told: "Negligence is the failure to do what a man of ordinary care and prudence would do in the same circumstances, or the doing of something that a man of ordinary care and prudence would not do under the same circumstances. *If there was no negligence on the part of Sherman & Reed's driver, Earle Hutchinson, then you must find your verdict in favor of Sherman & Reed.*"

And by instruction 2D, it was admonished: "The court instructs you that the burden of proof in this case is on the plaintiff, Frank Rohan; that is to say, he must prove his case by a preponderance of the evidence, and he *must in particular prove by a preponderance of the testimony that in some respect set forth in the complaint the driver, Earle Hutchinson, was negligent.* If the evidence is evenly balanced on this phase of the case you must find your verdict in favor of Sherman & Reed, and, of course, if the evidence preponderates in favor of Sherman & Reed on this phase of the case, you must find your verdict in their favor."

These instructions were given at defendant's request, without objection, and fully covered the subject of defendant's negligence, and the acts of the servant rendering the master liable.

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Where the charge to the jury, as a whole, leaves no doubt [2] as to the correct principles of law applicable to the case, ambiguity of a particular instruction given is not ground for reversal. (*Upton v. Larkin*, 7 Mont. 449, 17 Pac. 448; *Cushing v. Quigley*, 11 Mont. 577, 29 Pac. 337; *Fitschen v. Thomas*, 9 Mont. 52, 22 Pac. 450; *Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572; *Mulligan v. Montana U. Ry. Co.*, 19 Mont. 135, 47 Pac. 795; *Surman v. Cruse*, 57 Mont. 253, 187 Pac. 890; *Harrington v. Butte, A. & P. Ry. Co.*, 36 Mont. 478, 93 Pac. 640.)

The instruction complained of was drawn upon the theory that defendant's admission that Hutchinson's acts were within the scope of his employment made it proper. (*Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969.) The language of the [3] statute is its basis, as follows: "The owner of every vehicle running or traveling upon any highway or road for the conveyance of passengers, is liable for all damage to person or property done by any person in his employment as a driver while driving such vehicle, whether done willfully or negligently, or otherwise, in the same manner as such driver would be liable." (Section 5, Subchap. 8, Chap. 141, Laws 1915.) This statute fixes the liability of the owners of vehicles operated for the conveyance of passengers and was not considered by this court in application of the general doctrine of *respondeat superior* in the case of *Hoffman v. Roehl*, ante, p. 290, 203 Pac. 349.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and HOLLOWAY concur.

SAVAGE TIRE SALES CO., RESPONDENT, v. STUART ET AL.,
APPELLANTS.

(No. 4,949.)

(Submitted November 3, 1921. Decided December 12, 1921.)

[203 Pac. 364.]

Attachment — Complaint — Insufficiency — Pledges — Book Accounts—Defective Affidavit—Amendments.

Attachment—Discharge—Defective Complaint—Amendment Permissible.

1. Where discharge of an attachment is sought on the ground that the complaint does not state a cause of action, the inquiry as to the sufficiency of the pleading is confined to the questions whether the action is upon a contract, express or implied, for the direct payment of money; whether it states facts sufficient to constitute a cause of action against the defendant, and, if not, whether it can be amended so as to state a cause of action, a mere defective statement of a cause of action not being a sufficient ground for the discharge of an attachment.

Same—Security—Transfer of Book Accounts—Pledge.

2. An instrument whereby accounts were transferred from a debtor to a creditor with authority to collect them and apply the proceeds on the indebtedness to the extent of sixty-five per cent, thirty-five per cent being remitted to the debtor, constituted a "pledge" securing payment of the indebtedness, and therefore attachment did not lie on an affidavit stating that it had never been secured by any pledge, etc.

Same—Book Accounts—Pledge—Possession—Constructive Delivery.

3. Constructive delivery of accounts by a debtor to a creditor for purpose of collection is sufficient to satisfy the rule that a pledge is dependent on possession of the thing pledged.

Same—Book Accounts—Pledge—What not Destructive of Validity.

4. Where a debtor transferred accounts to a creditor as security with authority to collect them and apply the proceeds on the indebtedness, a reservation to the debtor of the right to make collections did not affect the validity of the pledge as between the parties.

Same—Erroneous Refusal to Dissolve—Remand With Permission to Amend Affidavit.

5. Where, at a hearing to dissolve an attachment, it appeared that while the debt had been originally secured by a pledge of book accounts, a portion of the accounts had proved noncollectible and the security to that extent had therefore become valueless, and the attaching creditor was deprived of an opportunity to amend his affi-

3. For authorities discussing the question of manner of pledging or assigning book accounts, see notes in 18 *Ann. Cas.* 446; 27 *L. R. A.* (n. s.) 666.

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davit because the trial court adopted his theory that the claim had not been secured and erroneously refused to discharge the writ, its order will be reversed and the cause remanded, with directions to discharge the attachment unless within a given number of days the creditor amend his affidavit to conform to the facts.

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

ACTION by Savage Tire Sales Company against R. W. Stuart and another, doing business as Helena Motor Company. From an order denying a motion to vacate an attachment, defendants appeal. Remanded, with directions.

Mr. Hugh R. Adair, for Appellants, submitted a brief; *Mr. Ulysses A. Gribble*, of Counsel, argued the cause orally.

Book accounts are proper subjects of pledge, for the law is as stated in 21 R. C. L. 634: "All kinds of personal property in existence may be pledged. This has been held to include * * * debts, bills receivable and book accounts." The case of *Clark v. Wiss*, 34 Kan. 553, 9 Pac. 281, holds that a mere delivery of the books of accounts is sufficient to sustain an assignment thereof as against subsequent attaching creditors. (Also see *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 84 Mich. 364, 47 N. W. 502.)

An oral assignment of book accounts is valid. (*In re Macauley*, 158 Fed. 322; *Hurley v. Bendel*, 67 Minn. 41, 69 N. W. 477; *Chapman v. Plummer*, 36 Wis. 262; *Moore v. Lowrey*, 25 Iowa, 336, 95 Am. Dec. 790; *White v. Kilgore*, 77 Me. 571, 1 Atl. 739; *Wilt v. Huffman*, 46 W. Va. 473, 33 S. E. 279; *Doremus v. Williams*, 4 Hun (N. Y.), 458; *Spafford v. Page*, 15 Vt. 490; *Mason v. Chicago Title & T. Co.*, 77 Ill. App. 19.) An oral assignment of book accounts is valid even though it were taken only as collateral security. (*Moore v. Lowrey*, 25 Iowa, 336, 95 Am. Dec. 790; *White v. Kilgore*, 77 Me. 571, 1 Atl. 739; *In re Macauley*, 158 Fed. 322.)

Mr. A. A. Grorud, for Respondent, submitted a brief and argued the cause orally.

We insist that the plaintiff did not have any such security as is contemplated by the statute. The California statute with reference to attachments is almost identical with our statute, providing that no attachment can issue unless someone on behalf of the plaintiff make an affidavit "that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or if originally so secured, that such security has, without any act of plaintiff, or the person to whom the security was given, become valueless." The California court has construed this statute in a number of cases. In the case of *Porter v. Brooks*, 35 Cal. 199, such court said: "The policy of the law is, that a creditor, having security by way of 'mortgage, lien or pledge upon real or personal property,' shall not resort to summary process for attachment until he has exhausted his security. But it must be a lien of a fixed, determined character, capable of being enforced with certainty, and depending on no conditions." In later cases the court affirmed the above case. (*Bank of California v. Boyd*, 86 Cal. 386, 25 Pac. 20; *Slosson v. Glosser*, 5 Cal. Unrep. 460, 46 Pac. 276; *McPhee v. Townsend*, 139 Cal. 638, 73 Pac. 584. See, also, *Bowman v. Wade*, 54 Or. 347, 103 Pac. 72; 6 C. J., sec. 117; 1 Shinn on Attachments, sec. 24.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover upon an account stated. Plaintiff secured a writ of attachment, and property belonging to the defendants was seized. Thereafter defendants moved to discharge the attachment upon the grounds (1) that the complaint fails to state a cause of action, and (2) that plaintiff's claim was secured by a pledge of personal property. After a hearing, the motion was denied, and defendants appeal from the order.

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1. With respect to the first ground of the motion, it is sufficient to say: "The inquiry as to the sufficiency of the complaint may not go further than to ascertain whether the action is upon a contract, express or implied, for the direct payment of money; whether it states facts sufficient to constitute a cause of action against the defendants; and, if it does not, whether it can be amended so as to state a cause of action. (*Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Hale Bros. v. Milliken*, 142 Cal. 134, 75 Pac. 653.) A mere defective statement of a cause of action is not a sufficient ground for the discharge of an attachment." (*Union Bank & Trust Co. v. Himmelbauer*, 56 Mont. 82, 181 Pac. 332.)

2. The record discloses the following facts: In December, [2, 3] 1920, the parties hereto executed an instrument in writing in which it was recited that defendants were indebted to plaintiff; that defendants had open book accounts and were desirous that the proceeds therefrom be appropriated in payment of the indebtedness to plaintiff. Then followed an ordinary transfer of the accounts to plaintiff, with authority to collect the same and apply the proceeds in payment of the indebtedness. In the next paragraph it was agreed that Mrs. B. Evangelisti should collect the accounts and remit sixty-five per cent to plaintiff and thirty-five per cent to defendants. The writing concludes as follows: "The authority to collect by Mrs. B. Evangelisti shall not be construed to exclude either Stuart Bros. or the Savage Tire Sales Company from collection or adjusting said accounts." The writing was filed for record with the county clerk and recorder. A list of the accounts was delivered to Mrs. Evangelisti, and, if the books containing the accounts were not actually delivered to her, she had access to them. She collected about \$1,000 and accounted for the money according to the terms of the agreement, and in February of this year resigned her position. In May the books were delivered to the Helena Adjustment Company, a collection agency, for the purpose of having further collections made, if possible. The manager of the agency

pronounced the remaining accounts practically worthless and collected only about \$50. In the meantime defendants had collected small amounts and accounted to plaintiff for sixty-five per cent thereof. From the language of the writing and the construction placed thereon by the parties as evidenced by their conduct, it is reasonably certain that it was the intention that the accounts should be considered a pledge as security for the payment of the indebtedness to the extent of sixty-five per cent of the accounts.

It is true that the lien of a pledge depends upon possession (sec. 5776, Rev. Codes), and that property of this character is not capable of manual delivery; but the authorities generally recognize a species of constructive delivery sufficient to satisfy the rule (*Bank v. Bank*, 226 Pa. 483, 134 Am. St. Rep. 1071, 18 Ann. Cas. 444, and note, 27 L. R. A. (n. s.) 666, 75 Atl. 683), and this doctrine apparently has the approval of our statute (sec. 5794, Rev. Codes).

It is the contention of the plaintiff that the transaction did [4] not constitute the accounts any security because the defendants reserved the right to make collection. It may be conceded, for the purpose of this appeal, that the transaction was void, as against the claims of third parties; but as no such claims are involved, it is not necessary to consider that phase of the subject. In principle, the transaction does not differ from that involved where a chattel mortgage is given upon a stock of merchandise and the mortgagor is permitted to remain in possession and sell the goods in the ordinary course of trade and account to the mortgagee for the proceeds. Such a mortgage is not *per se* void as against the claim of third parties, and its validity as between the parties to it is beyond question. (*Noyes v. Ross*, 23 Mont. 425, 75 Am. St. Rep. 543, 47 L. R. A. 400, 59 Pac. 367.) Even a verbal mortgage of chattels is as binding between the parties as it would be if expressed in writing. (*Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452.)

It is our conclusion that plaintiff's claim was originally [5] secured and that the attachment cannot be sustained upon

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the affidavit which recites that it "is not now, and never has been, secured by any mortgage, lien or pledge upon real or personal property." It is apparent from the evidence produced at the hearing that the security had been exhausted before this action was commenced, that is to say, all of the accounts collectible had been collected and what remained were not of any value. If these remaining accounts became valueless without any act of the plaintiff and the fact had been made to appear in the affidavit, the attachment should not be dissolved (*Barbieri v. Ramelli*, 84 Cal. 174, 24 Pac. 113), or, if upon this hearing, plaintiff had applied to the court for leave to amend the affidavit to conform to the proof, the application would have been granted practically as a matter of course (*Union Bank & Trust Co. v. Himmelbauer*, above). However, the trial court apparently adopted the theory that plaintiff's claim never had been secured and the opportunity to amend was not present. Under the circumstances, plaintiff ought not to be deprived of the benefit of the attachment if it chooses to make the proper amendment.

The cause is remanded to the district court, with directions to discharge the attachment unless within ten days from the date upon which the *remittitur* is filed in the office of the clerk of the district court plaintiff amends the affidavit to make the statement therein conform to the facts. Each party will pay his own costs of this appeal.

Remanded with directions.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

ON MOTION FOR REHEARING.

(Decided January 16, 1922.)

PER CURIAM: The motion for rehearing is overruled. This court is not to be understood as having foreclosed inquiry as

to whether the security mentioned became valueless within the meaning of sections 6656 and 6657, Revised Codes. The question was not presented fully to the trial court.

If an amended affidavit is filed, the right of the defendants to move again to dissolve and to contest the allegations of the amended affidavit is preserved.

Rehearing denied.

LAMONT, RESPONDENT, v. VINGER, APPELLANT.

(No. 4,529.)

(Submitted November 2, 1921. Decided December 12, 1921.)

[202 Pac. 769.]

Executors and Administrators—Real Property—Administrators' Sales—Void Order of Sale—Absence of Notice—Jurisdiction—Collateral Attack—Waiver—Curative Statutes—Caveat Emptor.

Executors and Administrators—Property of Intestate—Title in Whom.

1. Under section 4819, Revised Codes, title to the property of one who dies intestate passes immediately to the heirs, subject to the control of the district court and to the possession of the administrator for the purposes of administration.

Same—Recovery of Realty by Heir—Statute of Limitations.

2. An action to recover real property sold by an administrator under an alleged void order of sale, brought after the limitation prescribed by section 7596, Revised Codes, within which an heir must commence his action had expired, but within the three-year period after reaching his majority (sec. 7597), was not barred.

Same—Recovery of Real Property—Right of Action in Administrator not Exclusive.

3. The right given to an administrator by section 7604, Revised Codes, to maintain an action for the recovery of real property of his intestate (if applicable to an action to recover property sold by him under an order of sale) is not exclusive, section 7502 conferring the same right upon the heirs.

Same—Real Property—Administrator's Sale—Absence of Order to Show Cause—Sale Void—Collateral Attack.

4. *Held*, that where the proceedings had before the probate court on application by an administrator for an order of sale of real property disclosed that no order to show cause was ever made, published or served upon the parties interested, the sale was void for want of jurisdiction and open to collateral attack.

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Same.

5. *Held*, that the general rule that where an order of sale of real property of an intestate recites that an order to show cause was made and due proof of service thereof had to the satisfaction of the court, a purchaser need not look beyond the order and will be protected against a collateral attack, was not satisfied by an order made on the same day on which petition for the order was filed, reciting that the matter was heard "upon due proof to the satisfaction of the court of service according to law of the notice of said hearing," the order showing upon its face that it could not have been issued and served as required by the sections of the Code applicable.

Same—Actions in *Rem*—Process—Jurisdiction.

6. Unless a proceeding is strictly *in rem* a valid judgment cannot be rendered affecting the rights of third parties if they were not served with process or appeared and had an opportunity to be heard.

Same—Real Property of Intestate—Order of Sale—Proceeding *Quasi in Rem*—Process—Jurisdiction.

7. *Held*, that the matter of procuring an order of sale of real property belonging to the estate of an intestate is one *quasi in rem* and not strictly *in rem*, and that therefore failure to make an order to show cause and to serve it substantially in the manner required by the Codes rendered the sale void.

Same—Order of Sale of Real Property—Power of Court Special.

8. The authority of the probate court to order a sale of real property of an intestate is not included in its general jurisdiction over the administration but is special and limited and can be exercised only in the manner prescribed by the statute.

Same—Proceeding to Sell Real Property *in Invitum*—Substantial Compliance With Statutes Necessary.

9. So far as a nonconsenting heir is concerned, the proceeding to sell real property of his ancestor is *in invitum*, and the party who traces his title through such a sale must be able to show a substantial compliance with the law.

Same—Sale of Real Property—Notice Indispensable.

10. In the absence of waiver, notice to the heirs of an intestate of a contemplated sale of real property is indispensable.

Same—Process—Jurisdiction—Waiver—Collateral Attack.

11. A party not served with process who does not voluntarily appear and contest the action upon its merits does not waive the question of jurisdiction by remaining passive, but may thereafter attack the judgment collaterally.

Jurisdiction—Due Process of Law—Curative Statutes—Limit of Curative Power.

12. Under the constitutional provision that no one shall be deprived of property without due process of law, a curative Act cannot go to the extent of supplying jurisdiction where there was none in the first instance because of lack of notice and an opportunity to be heard.

Administrators' Sales—Void Order not Validated by Curative Statute.

13. *Held*, under the above rule (12) that Chapter 4, Laws of 1915, providing that irregularities in obtaining an order of court for the sale of real property of an intestate shall not invalidate the sale was ineffectual to cure the fatal omission of the court to take the steps necessary to give it jurisdiction to make the order.

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Constitutional Law—Vested Rights cannot be Destroyed by Statute.

14. Vested rights cannot be destroyed by the Legislature.

Same—Void Judgment is Always Void.

15. A judgment, void when rendered, will always remain void.

Same—Judgment—Depends upon Jurisdiction Before it is Rendered.

16. The validity of every judgment depends upon the jurisdiction of the court before it is rendered, and not upon what may occur subsequently.

Administrators' Sales—*Caveat Emptor* Applies.

17. The doctrine of *caveat emptor* applies to an administrator's sale, the purchaser being bound to know the limit of the administrator's authority and determine at his peril whether the proceedings are legal and sufficiently regular to authorize the sale.

Appeals from District Court, Fergus County; Jack Briscoe, Judge.

ACTION by Harry W. Lamont against Ole G. Vinger and another to recover possession of an undivided interest in real estate. Judgment for plaintiff and defendant Vinger appealed from the judgment and from an order denying a new trial. Affirmed.

Messrs. Belden & De Kalb, for Appellants, submitted a brief; *Mr. H. L. De Kalb* argued the cause orally.

This is a collateral attack upon the order of sale and the order confirming the sale. Where a recital of the character found in the order of sale and above cited is found in the records, a sale based thereon is not vulnerable to a collateral attack. (11 R. C. L., secs. 474, 476; *Richardson v. Butler*, 82 Cal. 174, 16 Am. St. Rep. 101, 23 Pac. 9; *Applegate v. Lexington & Carter Co. Min. Co.*, 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742 [see, also, Rose's U. S. Notes].)

The purchaser is not bound to look beyond the decree. (*Blackman v. Mulhall*, 19 S. D. 534, 104 N. W. 250; *Zilmer v. Gerichten*, 111 Cal. 73, 43 Pac. 408.)

The action was barred by limitation. (*Dennis v. Bint*, 122 Cal. 39, 68 Am. St. Rep. 17, 54 Pac. 378.) "The laches of the trustee while he holds office must be imputed to the beneficiary

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and the remedy of the heir is against the administrator.” (See, also, *Wheeler v. Bolton*, 54 Cal. 302; *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879.)

The sale cannot be now questioned because of the curative Act. (*Williamstown Graded Free School District v. Webb*, 89 Ky. 264, 12 S. W. 298; *Grignon v. Astor*, 2 How. (U. S.) 319, 11 L. Ed. 283 [see, also, Rose’s U. S. Notes].) In *McNamara v. Casserly*, 61 Minn. 335, 344, 63 N. W. 880, it is held that the jurisdiction once acquired in a probate proceeding continues for the purpose of subsequent sales, decree of distribution and other matters, without further notice. This court in *State v. Benton*, 12 Mont. 306, 34 Pac. 301, decided that a probate proceeding of this character is a proceeding *in rem*. In *Myers v. McGavock*, 39 Neb. 843, 862, 42 Am. St. Rep. 627, 58 N. W. 522, the court holds that notice is not jurisdictional in that such proceedings are *in rem*. (See, also, *Cooper v. Sunderland*, 3 Iowa, 114, 135, 66 Am. Dec. 52; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458.)

It is even held that the legislature may legalize a void act. (*Fair v. Buss*, 117 Iowa, 164, 90 N. W. 527; *Richman v. Muscatine*, 77 Iowa, 513, 14 Am. St. Rep. 308, 4 L. R. A. 445, 42 N. W. 422.)

It was competent for the legislature to have cut off by a new statute of limitations the rights of the plaintiff,—in effect the curative Act so operates. It is the policy of the law to quiet titles to real estate sold by order of the probate court and in *Harlan v. Peck*, 33 Cal. 515, 91 Am. Dec. 653, it is said: “In view of that policy merely there can be no distinction between sales which may be termed void for the want of jurisdiction, and those which are voidable only.” This doctrine has been reaffirmed in *Ganahl v. Soher*, 68 Cal. 95, 97, 8 Pac. 650, where the sale was void because of invalidity of the appointment of the acting administrator. (See, also, *Meeks v. Vassault*, 3 Sawy. 206, 211, Fed. Cas. No. 9393.)

Mr. Ralph J. Anderson and *Mr. Park Smith*, for Respondent, submitted a brief; *Mr. Henry C. Smith*, of Counsel, argued the cause orally.

Upon a careful consideration of the case of *Dennis v. Bint*, cited by appellant, we believe this court will be disposed to disregard it in favor of other and better considered cases, as other courts have done. That this court will not follow decisions of the courts of the state from which the statute is borrowed when such decisions are demonstrably wrong, see: *Brophy v. Downey*, 26 Mont. 252, 261, 67 Pac. 312; *Finlen v. Heinze*, 28 Mont. 548, 563, 73 Pac. 123; *Oleson v. Wilson*, 20 Mont. 544, 547, 63 Am. St. Rep. 639, 52 Pac. 372. The supreme court of Nevada, in *Wren v. Dixon*, 40 Nev. 170, Ann Cas. 1918D, 1064, 161 Pac. 722, 167 Pac. 324, refused to follow the case of *Dennis v. Bint*, *supra*. The court there decides that an infant heir is entitled to the full time given him by statute to bring his action. This is the true principle of decision of the instant case; that inasmuch as the title to the real estate vests immediately in the heir upon the death of his ancestor and the statute gives him a right of action at all times, he cannot be barred by virtue of a trust relation set up in cases decided at a time and under statutes when and by which the administrator alone had the right of action. (See, also, *Bacon v. Gray*, 23 Miss. 140.) The district court, in administering the Lamont estate, and in attempting to subject the real estate to the payment of debts, was acting in the exercise of a special, limited and statutory jurisdiction, and each step in acquiring jurisdiction strictly as required by statute must appear positively and affirmatively from the record. (*Galpin v. Page*, 18 Wall. (U. S.) 350, 371, 21 L. Ed. 959, 964 [see, also, Rose's U. S. Notes]; *Elliott v. Fowler*, 112 Ky. 376, 65 S. W. 849; *Myrick v. Jacks*, 33 Ark. 425; *Brown v. Sceggell*, 22 N. H. 548; *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456.) "The records of probate courts must show jurisdiction in order to sustain their proceedings." (*Gibbs v. Shaw*, 17 Wis. 197, 84 Am. Dec. 737.)

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Proceedings for the sale of the real estate of an intestate are in the nature of an action, of which the presentation of the petition is the commencement and the order of sale is the judgment. (*Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546; *In re Tuohy's Estate*, 33 Mont. 230, 83 Pac. 486; *Campbell v. Drais*, 125 Cal. 253, 57 Pac. 994; *Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656.) Therefore, a service of notice upon persons interested, to-wit, of an order to show cause, is jurisdictional. (*Hill v. Taylor*, 99 Mo. App. 524, 74 S. W. 9; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Herdman v. Short*, 18 Ill. 59, 60; *Brown v. Sceggell*, 22 N. H. 548; 10 Ency. Pl. & Pr. 176; 18 Cyc. 700; *Martin v. Williams*, 42 Miss. 210, 97 Am. Dec. 456; *Gibbs v. Shaw*, 17 Wis. 197, 84 Am. Dec. 737.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In January, 1895, Hannah D. Lamont died intestate in Fergus county, leaving as her heirs at law, W. H. Lamont, her husband, and Charles A. and Harry W. Lamont, her sons, the latter then less than four years old. W. H. Lamont was appointed administrator of the estate, and qualified and entered upon the discharge of his duties. The inventory returned disclosed that the property left by the deceased consisted of 1,550 sheep, subject to a chattel mortgage, and 238 acres of land (particularly described), of the appraised value of \$600. Claims were presented and allowed, which, with the costs and charges of administration, amounted to more than \$700. The chattel mortgage upon the sheep was foreclosed, and the entire proceeds of the sale were applied in satisfaction of the debt secured by the mortgage.

On March 31, 1898, the administrator presented a petition for the sale of the real estate, and on September 7 following an order of sale was made, notice of the sale given, the property sold to Ole G. Vinger for \$1,000, an account of the sale returned, notice of a hearing on the return given and on Jan-

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uary 30, 1899, an order was made confirming the sale. Thereafter an administrator's deed was executed, delivered and recorded, and some time later Vinger assumed to mortgage the property to the Bank of Fergus County. On August 2, 1915, Harry W. Lamont commenced this action against Vinger and the bank to recover possession of an undivided one-third interest in the real estate, upon the theory that the sale by the administrator was void. He prevailed in the lower court, and from the judgment entered therein and from an order denying a new trial, defendant Vinger alone appealed.

1. Appellant insists, first, that the trial court erred in re-[1-3] fusing to hold that plaintiff's cause of action was barred by the provisions of section 7596, Revised Codes.

It is conceded that plaintiff did not become of age until August 10, 1912, so that the three-year period mentioned in the statute above had not expired after he reached his majority and before this action was commenced; but it is contended that because the right of action which the administrator had, was barred three years after the sale, the plaintiff's right of action was barred also. This contention proceeds upon the theory that during the course of administration the administrator alone had the right to prosecute an action for the recovery of the property, or, in other words, that the administrator in virtue of his office was a trustee whose laches were imputable to the beneficiary—plaintiff herein—even though plaintiff was a minor. This theory prevailed under the early California statutes (*McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; *Meeks v. Olpherts*, 100 U. S. 564, 25 L. Ed. 735), and appellant contends that the same rule is in force in that state under the present statutes, identical with our sections 7596 and 7597, Revised Codes, and since our statutes were borrowed from California, we should adopt the same construction. In support of the last contention the case of *Dennis v. Bint*, 122 Cal. 39, 68 Am. St. Rep. 17, 54 Pac. 378, is cited. On appeal that case was heard first in department, the opinion being prepared by Commissioner Britt. It was heard again

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by the court in bank, and the commissioner's opinion is published as the opinion of the court, but of the seven members of the court three dissented outright and the Chief Justice concurred in the result only, and upon an entirely different ground, at the same time indicating disapproval of the views of the commissioner reaffirming the doctrine of *McLeran v. Benton* above. Under these circumstances the case is not authority for the proposition now urged upon us. In the commissioner's opinion, sections 1573 and 1574, California Code of Civil Procedure, identical in terms with our sections 7596 and 7597 above, are quoted at length, but no attempt was made to give effect to the last-mentioned section. We submit that the conclusion reached was altogether unwarranted, but in any event the same construction of our statutes is impossible, even though the language is the same. So far as this question is concerned, there has not been any material change in our statutes since the death of the decedent, and for convenience our references are to our present Code, disregarding the amendments made in 1915.

At common law the administrator had no title to, interest in, or right to the possession of the real property of the decedent, and therefore could not maintain an action with respect to it. Whatever authority he has now is derived from the statutes. (2 Schouler on Wills, Executors, and Administrators, 1199, 1603.) By section 4819, Revised Codes, the property, both real and personal, of one who dies intestate, passes to the heirs, subject to the control of the district court and to the possession of the administrator, for the purposes of administration.

Assuming that section 7604, Revised Codes, gives to an administrator the right to maintain an action to recover the possession of real property under circumstances such as are here presented, that right is not exclusive, for section 7502 provides: "The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting

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title to or for partition of the same against any one except the executor or administrator." Section 7596 is a statute of limitations which fixes the time generally within which an heir or other claiming under the decedent must commence his action, and section 7597 provides: "The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after removal of the disability."

In our judgment, the foregoing provisions are too plain to admit of construction. If the administrator had a right to prosecute an action for the recovery of the property which he had sold, that right was not exclusive. The right of the heir is secured to him in no uncertain terms, and since plaintiff commenced this action within three years after reaching his majority, his cause of action was not barred. (*Wren v. Dixon*, 40 Nev. 170, Ann. Cas. 1918D, 1064, 161 Pac. 722.)

2. In the proceedings taken to procure an order for the sale [4-5] of this property no mention whatever is made of an order to show cause, the publication of the same, or proof of publication or other service. Section 7561, Revised Codes, provides that the administrator may sell the real property of the estate when necessary to procure funds to pay family allowance, debts of the estate, charges of administration or legacies. Section 7562 enumerates the matters which must be made to appear in the verified petition for the order of sale. Section 7563 provides that if it appears to the court or judge, from such petition, that it is necessary to sell the whole or some portion of the real estate for any of the purposes mentioned in section 7562, an order must be made, "directing all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary." Section 7564 provides that the order to show

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cause must be served personally on all persons interested in the estate, including heirs, or be published four successive weeks in a newspaper in the county, unless all persons interested join in the petition or assent thereto in writing, in which event the notice may be dispensed with. Section 7565 provides: "The court or judge, at the time appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate, who may oppose the application," etc. Section 7567 provides for an order of sale and the circumstances under which it may direct the sale of all of the real estate belonging to the estate.

Counsel for appellant concede that there is not any evidence that an order to show cause was ever made or served, except the recital in the order of sale, but they do insist that there is a recital therein that due notice had been given, and that this is sufficient as against a collateral attack. It is the general rule that if the order of sale recites that an order to show cause was made and due proof of service thereof had to the satisfaction of the court, a purchaser need not look beyond the order, and will be protected as against a collateral attack. (*Zilmer v. Gerichten*, 111 Cal. 73, 43 Pac. 408.) The order herein recites that the petition was filed on March 31, 1898, and then continues: "Said matter coming on regularly to be heard on the thirty-first day of March, 1898, and upon due proof to the satisfaction of the court of service according to law of the notice of said hearing, and all and singular the law and the evidence being by the court understood and duly considered, whereupon, it is ordered," etc. Standing alone, that language means that the only hearing upon the petition was the one had the very day the petition was filed; therefore it was impossible that an order to show cause could have been

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issued and served as required by law; and there are other circumstances disclosed by the probate record which compel the conclusion that an order to show cause never was made or served.

But counsel contend that, though this be conceded, it does [6,7] not render the sale void: (a) Because the proceeding is one *in rem*; and (b) because of our curative statute.

(a) The court acquired jurisdiction of the subject matter by the proceedings leading up to and including the petition for sale, and it may be conceded for the purposes of this case that if the matter of procuring an order of sale of real property belonging to the estate of an intestate is a proceeding strictly *in rem*, notice is a matter of courtesy and not of necessity, and the failure to give it in this instance was an irregularity only, and did not render the sale void. (Van Fleet on Collateral Attack, sec. 405; 2 Black on Judgments, sec. 794.) In the section just referred to, Van Fleet states that in Alabama, Arkansas, Louisiana, Texas and Washington such a proceeding is held to be one strictly *in rem*, and probably two or three other states may be included in the same class; but by the overwhelming weight of authority such a proceeding is classed as one *quasi in rem*. (2 Black on Judgments, sec. 808; 23 Cyc. 1411.) It is a general rule that unless the proceeding is strictly *in rem* a valid judgment cannot be rendered affecting the rights of third parties unless they are served with process or appear and have an opportunity to be heard. (23 Cyc. 1408.) In California—from which state we borrowed our Probate Practice Act—it is held that the proceeding is *quasi in rem*, and that the failure to make an order to show cause and to serve it substantially in the manner required by the statute renders the sale void. (*Campbell v. Drais*, 125 Cal. 253, 57 Pac. 994.) The facts of that case cannot be distinguished from the facts of the case under consideration.

The authority of the probate court to order a sale of realty [8] is not general, but special and limited. It is derived from the statute, and can be exercised only for the purposes

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mentioned and in the manner prescribed by statute. (*Haynes v. Meeks*, 20 Cal. 288; *Packer's Estate*, 125 Cal. 396, 73 Am. St. Rep. 58, 58 Pac. 59; *Noon's Estate*, 49 Or. 286, 88 Pac. 673, 90 Pac. 673.) As observed before, the title to the property vests in the heirs immediately upon the death of the intestate. So far as the nonconsenting heirs are concerned, the proceeding to sell the real estate is *in invitum*—a proceeding for the forced divestiture of their title—and since it is only by the law that their title can be taken away, the party who traces his title through the law must be able to show a substantial compliance with the law. (*Gregory v. McPherson*, 13 Cal. 562; *Townsend v. Gordon*, 19 Cal. 208.) The proceeding to sell is independent in the sense that jurisdiction over it is invoked by filing the petition, and is not included in the general jurisdiction over the administration. (*Richardson v. Butler*, 82 Cal. 174, 16 Am. St. Rep. 101, 23 Pac. 9.) Section 7565, Revised Codes above, provides for a hearing upon the petition, but only after satisfactory proof of service of the order to show cause has been made. In other words, until such satisfactory proof of service has been presented, the court is without authority to hear the petition or take any action with reference to it.

It is the general rule that in the absence of waiver, notice [10,11] to the heirs is indispensable. (*Mitchell v. Bowen*, 8 Ind. 197, 65 Am. Dec. 758; *Fell v. Young*, 63 Ill. 106; *Mikel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161.) The reason for this rule is obvious. The heirs, being interested in the property, have the right, secured to them by statute, to oppose the sale and to be heard. At such hearing they may offer any evidence tending to show that the sale is unnecessary, and since a necessity for the sale is the only condition upon which it may be ordered, if they are successful in their contention the court is without authority to make the order. For example: Upon the hearing the heirs may contest the validity of the claims which constitute the indebtedness upon the existence of which the petition to sell is based (*Beckett v. Selover*, 7 Cal. 215,

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68 Am. Dec. 237; *Schroeder's Estate*, 46 Cal. 304; *Crosby's Estate*, 55 Cal. 582); or they may be able to show that the realty is yielding income sufficient to discharge all valid claims or to pay them in part, and thereby either dispense with the necessity for a sale altogether, or reduce the amount of the realty to be sold (*Haynes v. Meeks*, above); or they may be able to convince the court that the best interests of the estate will be served by borrowing the money (sec. 7547, Rev. Codes), or mortgaging the property instead of selling it (secs. 7600, 7601); but whether they are successful in any respect is immaterial. They are entitled to be heard, and, if not afforded an opportunity, their interests cannot be affected. (*Pearson v. Pearson*, 46 Cal. 609.)

Speaking of statutes identical with ours providing for a verified petition, an order to show cause and service of notice, the California court said: "Since the procedure is one in which there are no adversary parties present at all times in court, it is reasonable to hold, as has always been held, that these acts are essential to the power on the part of the court to order the sale. In that sense the petition and notice are jurisdictional." (*Burris v. Kennedy*, 108 Cal. 331, 41 Pac. 458.)

Counsel for appellant insist that this court is committed to the doctrine that a proceeding of this character is one *in rem*, and in support thereof cite *State ex rel. Ruef v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, 9 Ann. Cas. 418, 6 L. R. A. (n. s.) 617, 85 Pac. 866. The language therein employed must be understood in the light of the fact that we had under consideration the effect of a judgment of a sister state admitting a will to probate. The conclusion reached in that case does not infringe upon the rule that probate proceedings generally are *quasi in rem*. (2 Black on Judgments, sec. 635; 15 R. C. L. 637.)

Beginning with the early case of *Broadwater v. Richards*, 4 Mont. 80, 2 Pac. 546, this court held that "Proceedings for the sale of the real estate of an intestate are in the nature of

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an action of which the presentation of the petition is the commencement and the order of sale is the judgment.”

In *Davis' Estate*, 35 Mont. 273, 88 Pac. 957, it was said: “The notice required in probate proceedings serves the purpose of a summons in ordinary actions.” In *State ex rel. Shields v. District Court*, 24 Mont. 1, 60 Pac. 489, it was held that the presentation of a verified petition and notice to all persons interested were necessary prerequisites to obtain an order to lease real property belonging to an estate.

Expressions may be found in some of our decisions to the effect that probate proceedings are in the nature of proceedings *in rem*, but it is clear from a consideration of the particular questions decided that it was never intended to hold that a failure to give notice to the heirs or other persons interested in a proceeding of this character is an irregularity only.

This proceeding is not analogous to the one to foreclose a mortgage or lien upon real property. A mortgage is the voluntary contract of the property owner, while a lien is impressed upon particular property by the law. An allowed claim against an estate or a charge for expenses of administration is not in any sense a lien upon the property belonging to the estate. (Sec. 7536, Rev. Codes.)

It is suggested by counsel for appellant that, even though this plaintiff was not notified of the application to sell, he had an opportunity to oppose confirmation. This may be granted, but it does not mend matters. A party defendant to a civil action, who has not been served with summons, may appear voluntarily and contest the action upon the merits, but he is not required to do so, and he does not waive the question of jurisdiction by remaining passive, but may thereafter attack the judgment collaterally.

It is our conclusion that by failing to make an order to show cause and requiring service of notice, the court did not acquire jurisdiction of the person of this plaintiff; that the order of sale was void and open to collateral attack, and, as a matter of course, the sale made pursuant to such order did

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not operate to divest plaintiff of his interest in the property. (18 Cyc. 724.)

It is an elementary rule that in judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession. (Cooley's Constitutional Limitations, p. 506.)

(b) Finally, counsel for appellant contend that, independently of every other consideration, the defect or irregularity in the proceedings arising from the failure to make an order to show cause or give notice was cured by the provisions of Chapter 4, Laws of 1915. That Act, after referring to sales by executors, administrators or guardians, continues: "And all irregularities in obtaining the order of the court for such sale, and all irregularities or defects in making or conducting such sale by said executor or administrator or guardian shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity."

The limit to which curative or healing statutes may extend has been the subject of much judicial consideration. The general rules applicable are quite well settled, but in the application of these rules to concrete cases a great diversity of opinion is manifested. In Cooley's Constitutional Limitations, 530-545, the principal rules are stated as follows: "A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. * * * But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it had and could have no power to permit or sanction in advance. * * * If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute.

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And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."

Bearing in mind that immediately upon the death of the intestate, title to the property vests in the heirs, and that proceedings to obtain an order to sell the real property have for their object divesting the heirs of their title and are *quasi in rem* only, we conclude that the principle announced by the authorities that notice to the heirs and others interested and an opportunity to be heard are essential, rests upon the fundamental rule of law incorporated in our Constitution that no one shall be deprived of his property without due process of law, and that notice and an opportunity to be heard are indispensable elements of due process. Accepting this as correct, and it follows that it was not within the power of the legislature, by previous enactment, to dispense with notice, and accordingly, the Act did not, and could not, cure the omissions in these proceedings.

It may be conceded that it is within the power of the legislature to repeal section 4819 above, and make other provision for the disposition of property belonging to one who dies intestate, but until that section is repealed or modified materially the title vests in the heirs, and cannot thereafter be taken from them except by proceedings in harmony with the due process clause of the Constitution.

Speaking of statutes designed to remedy defects in probate proceedings particularly, the author of the article in *Corpus Juris* says: "These generally cure merely those defects which do not concern jurisdictional steps, and it is usually held that they cannot constitutionally operate to give effect to a sale which is void for want of jurisdiction." (24 C. J. 694. See, also, 18 Cyc. 830; *McGillic v. Corby*, 37 Mont. 249, 17 L. R. A. (n. s.) 1263, 95 Pac. 1063; *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82.) These authorities all proceed upon fundamental [14-16] principles of constitutional law, among which are the

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following: Vested rights cannot be destroyed by the legislature. (*Shea v. North-Butte Min. Co.*, 55 Mont. 522, 179 Pac. 499.) A judgment void when rendered will always remain void. The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. (*Pennoyer v. Neff*, 95 U. S. 714, 728, 24 L. Ed. 565.)

We need not stop to review the case of *Grignon v. Astor*, 2 How. (U. S.) 319, 11 L. Ed. 283, and other authorities cited by counsel for appellant which follow that leading case. It is sufficient to say that a rule different from the one we have adopted prevails in every jurisdiction in which a proceeding of this character is held to be strictly *in rem*, wherein seizure of the property itself constitutes notice to all persons interested.

We conclude by remarking that the doctrine of *caveat* [17] *emptor* applies to an administrator's sale. The purchaser is bound to know the limit of the authority of the one who assumes to sell, and must determine at his peril whether the proceedings are legal and sufficiently regular to authorize the sale. (11 R. C. L. 350; 18 Cyc. 826.)

We have adopted the views which to us appear to be supported by reason and by the weight of authority, though decided cases to the contrary may be found.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

**SNELL, RESPONDENT, v. NORTH BRITISH & MERCANTILE
INSURANCE CO., APPELLANT.**

(No. 4,543.)

(Submitted November 2, 1921. Decided December 12, 1921.)

[203 Pac. 521.]

Fire Insurance—Proof of Loss—Sufficiency—Waiver—Pleading.**Fire Insurance—Proof of Loss—Waiver.**

1. Where defendant insurance company's adjuster co-operated with the insured in making up a list in detail of the latter's property destroyed by fire and the amount of the loss, and in effect stated to him that the only thing left to be determined was the amount that should be paid, he gave the insured cause to believe that nothing further was required of him, amounting to a waiver of the requirement of the policy making it incumbent upon the insured to furnish proof of loss within a given time.

Same—Insufficient Proof of Loss—Retention Without Objection—Waiver.

2. Receipt and retention by the insurer, without objection, of a paper which insured believed to be such proof of loss as was required by a fire insurance policy, and failure to demand further proof, constituted a waiver of the right of the insurer to object thereto on the ground that it did not satisfy the requirements of the policy.

Same—Insufficiency of Proof of Loss—What may Constitute Waiver.

3. *Held*, that by advising its local agent upon inquiry as to the status of plaintiff's claim under a fire insurance policy that the matter of the adjustment of the loss was in the hands of its adjuster, without stating that proof of loss was unsatisfactory, the insurer waived any defect or insufficiency in the proof of loss furnished.

Same—Policy Requirements—Waiver must be Pleaded.

4. Where plaintiff in an action on an insurance policy relies upon a waiver of material provisions thereof, he must plead the facts constituting it, an allegation of full performance of all its conditions not being established by proof of waiver alone.

Same—Instruction—Proper Refusal.

5. An offered instruction that unless plaintiff had established the fact that he gave, and the company received, the proof of loss by fire required by the policy he could not recover, was properly refused as not applicable, the undisputed facts showing waiver of the requirement.

Same—Retention of Premium—Policy Requirements—What not Waiver.

6. Defendant insurer not having denied the contract of insurance and its obligations thereunder, retention of a premium due on the policy paid some months after destruction of plaintiff's property by fire could not be construed as a waiver of any of the provisions of the policy, and admission in evidence of such payment was erroneous, but harmless.

1. Negotiation for or offer of settlement as waiver of proofs of loss required by fire insurance policy, see note in *Ann. Cas.* 1916A, 594.

Appeals from District Court, Ravalli County; Theodore Lentz, Judge.

ACTION by L. C. Snell against the North British and Mercantile Insurance Company of London and Edinburgh. From a judgment for plaintiff and an order denying it a new trial, defendant appeals. Reversed and remanded.

Messrs. Frank & Gaines, for Appellant, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

Exact literal compliance with the policy requirements is, of course, not required; but substantial compliance is. (19 Cyc. 849; 14 R. C. L., Insurance, sec. 507; *DaRin v. Casualty Co. of America*, 41 Mont. 175, 184, 137 Am. St. Rep. 709, 27 L. R. A. (n. s.) 1164, 108 Pac. 649.) An investigation such as here conducted by Luke could not possibly operate to relieve Snell from the duty of furnishing proofs of loss. (*Kuck v. Citizens' Ins. Co.*, 90 Wash. 35, 155 Pac. 406; *Petroff & Co. v. Equity Fire Ins. Co.*, 183 Iowa, 906, 167 N. W. 660; *Bond v. National etc. Ins. Co.*, 77 W. Va. 736, 88 S. E. 389.) "That preliminary negotiations looking to an amicable settlement of a loss is not waiver of the terms of a policy, and that an action cannot be maintained without strict compliance, unless it appears that the insured was misled to his injury, in which event waiver will be implied, has been frequently held by this court." (*Goldstein v. National etc. Ins. Co.*, 106 Wash. 346, 180 Pac. 409, 412; see, also, *Crandon v. Home Ins. Co.*, 99 Kan. 785, 163 Pac. 458-460; *Fournier v. German American Ins. Co.*, 23 R. I. 36, 49 Atl. 98; *Missouri etc. R. Co. v. Western etc. Co.*, 129 Fed. 610; *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 316, 60 N. W. 663, 665, 666; *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, 20 Pac. 408.) The effect of failure to furnish proofs of loss is discussed in *Commercial Union etc. Co. v. Shults*, 37 Okl. 95, 130 Pac. 572.

Having pleaded performance of conditions precedent to the maintenance of his action, Snell could not properly introduce

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any evidence tending to show waiver of policy requirements or recover on the theory that performance had been waived. Waiver must be pleaded. "Ratification and waiver are in the nature of estoppel and to be available they must be pleaded when an opportunity to make such plea is presented. (*Smith v. Barnes*, 51 Mont. 202, Ann. Cas. 1917D, 330, 149 Pac. 963; *Long Creek Bldg. Assn. v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366; *Waller v. City of New York Ins. Co.*, 84 Or. 284, Ann. Cas. 1918C, 139, 164 Pac. 959; *Mercer v. Germania Ins. Co.*, 88 Or. 410, 171 Pac. 412; *Aronson v. Frankfort etc. Ins. Co.*, 9 Cal. App. 473, 99 Pac. 537; *American Jobbing Assn. v. James*, 24 Okl. 460, 103 Pac. 670; 19 Cyc. 923; *Hartford Fire Ins. Co. v. Mathis*, 57 Okl. 332, 157 Pac. 134.) In *Insurance Co. v. Johnson*, 47 Kan. 1, 27 Pac. 100, it was held that even though the evidence received was sufficient to establish waiver, yet, having been received over objection that no plea of waiver had been made, the verdict in favor of plaintiff must be set aside.

Mr. C. S. Wagner and *Mr. J. D. Taylor*, for Respondent, submitted a brief; *Mr. Wagner* argued the cause orally.

While waiver is not pleaded, we contend it was not necessary because defendant was not misled to its prejudice, it having knowledge of and being in possession of all of the facts. The variance, if any, between the allegations and the proof we contend was, therefore, not material, and is excused by the provisions of section 6585, Revised Codes. A case in point is that of *Robinson v. Palatine Ins. Co.*, 11 N. M. 162, 66 Pac. 535. It appears that jurisdiction has a statute similar to ours. In that case the complaint alleged plaintiff had performed all and every act required to be done by him, both before and after the fire, but that the insurance company refused to adjust the loss or to pay the same, or any part thereof. A copy of the policy was filed with the complaint. The answer of the defendant consisted of a number of affirmative matters in addition to the general issue, some of which were substan-

tially similar to the defenses here interposed. After joinder of issue the cause was tried before a jury which rendered a verdict in favor of the plaintiff. In that case as here the plaintiff contended that a substantial compliance with the terms and conditions of the policy as to notice of proof of loss is all that is required and the court sustained the plaintiff's contention, saying: "The mere failure to verify the notice of loss, under the facts in this case if such verification was not made, was waived by the insurer. We can see no substantial variance, which affects the merits of this case, between the pleadings and the proofs adduced on the trial." (See, also, *Foster v. Fidelity & Casualty Co.*, 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69; *Tillis v. Liverpool etc. Ins. Co.*, 46 Fla. 268, 110 Am. St. Rep. 89, 35 South. 171; *Stephens v. Union Assur. Society*, 16 Utah, 22, 67 Am. St. Rep. 595, 50 Pac. 626; *Jerrils v. German Am. Ins. Co.*, 82 Kan. 320, 20 Ann. Cas. 251, 28 L. R. A. (n. s.) 104, 108 Pac. 114; *Ackley v. Phenix Ins. Co.*, 25 Mont. 272, 64 Pac. 665.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

On the 15th of December, 1917, plaintiff procured an insurance policy of defendant covering creamery stock and equipment contained in a certain building at Corvallis, the policy taking effect at noon of that day. On that same evening a fire occurred, resulting in a total loss of the insured property. This action was commenced to recover the amount claimed to be due upon the policy. The case was tried before the court with a jury. Verdict was rendered in favor of plaintiff, and judgment entered accordingly. Motion for new trial was made and overruled. Defendant appeals from the judgment, and from the order overruling the motion.

Defendant insists that the judgment cannot be sustained because plaintiff did not furnish proof of loss in accordance with the terms of the policy, which was a condition precedent to the commencement of the action. The policy requires that

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within sixty days after a loss insured shall furnish the company with proof of loss, signed and sworn to by him, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, all encumbrances thereon, all other insurance, whether valid or not, covering any of such property, a copy of all the descriptions and schedules in all policies, any changes in the title, location, possession, or exposures of said property since the issuing of the policy, and by whom and for what purpose any building described in the policy in the several parts thereof were occupied at the time of the fire. The policy also provides that the loss shall not become payable until sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss shall have been received by the company in accordance with the terms of the policy. There is no contention but that the notice of loss was properly given, and that there was an estimate of the amount of the loss; but defendant contends that at no time has there been any proof of loss as required by the policy.

There was received in evidence as a proof of loss exhibit "A," consisting of a detailed statement of the creamery equipment and stock on hand, with cost values, with certain deductions for depreciation. This exhibit was supplemented by the testimony of plaintiff showing that, after the notice of loss was given, and about thirty days thereafter, one Luke came to make an adjustment of the policy. Luke spent a portion of two days with plaintiff, looking over a plant at Hamilton, so that Luke could acquire some knowledge of the operation of a creamery in examining the site of the fire and in determining the amount of the loss. Plaintiff worked with him, and together they made up the list. As to some items which had been recently purchased, the cost price was taken from invoices in plaintiff's possession; as to other items, inquiry was made of merchants handling similar merchandise, and in other instances reference was made to catalogue prices of

similar articles. Luke stated that there was a definite rule of discount for depreciation which was set forth in a book in his possession, which book he used in figuring depreciation, which items of depreciation were at three different places in the exhibit deducted from the cost prices. This exhibit was made in duplicate by Luke, and one copy given to plaintiff. Before Luke left he stated to plaintiff that he would make a report to the company, but did not tell him what his report would be, or what, if any, recommendation he would make, but he did state that it was not a question of how much or how little he could give but it was a question of getting the thing down to what it should actually be. He did not tell plaintiff anything else to do or not to do, and plaintiff did not prepare any other papers. On the 4th of March, 1918, presumably upon inquiry of plaintiff, the local agent of the company wired to its general agents as follows: "Advise condition of L. C. Snell loss milk being hauled six miles at great additional expense weather will not permit much longer. Snell anxious to build again. How soon will settlement be made investigated two weeks ago? Why more delay? Snell will employ attorney. Wire." On the 5th of March the general agents of the company wired to the local agent: "Confer Robert A. Luke Helena. Snell adjustment in his hands." On the same day the general agents wrote a letter to the local agent expressly confirming the message, and "further advising that all matters pertaining to the adjustment of the loss will have to be taken up with Mr. Luke." At no time before the commencement of suit did defendant object on the ground that there had not been furnished any proof of loss, or that the exhibit "A" was insufficient to constitute such proof.

The question arises whether or not, under this statement of facts, the defendant waived the requirement of the policy as to the furnishing of proof of loss. There are three grounds upon which waiver may be claimed: (1) That defendant made adjustment of the loss and in connection therewith gave plaintiff to understand that nothing further would be required of

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him; (2) that defendant retained the statement showing the loss without any objection to it on the ground that it was defective or insufficient in meeting the requirements of the policy as to proof of loss; (3) that, after the expiration of the time within which proof of loss should be furnished, defendant, without raising any question upon the insufficiency of the proof of loss, expressly stated that the matter of adjustment was in the hands of Luke.

Upon the first ground, defendant insists that the adjustment [1] was merely an estimate or ascertainment of the loss, and that such did not constitute any waiver of the requirement of the policy as to the furnishing of proof of loss. It is conceded by defendant that if, in connection with the estimate or ascertainment of loss, defendant's agent so conducted himself that he misled the plaintiff and caused him to understand that nothing further would be required of him, such conduct would constitute a waiver. This is undoubtedly a correct statement of the rule. (26 C. J. 403, and cases cited.) Under the terms of the policy, it is expressly provided that the insurer shall "not be held to have waived any provision or condition of this policy by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for." It is therefore clear that the company can make an examination to the extent of determining the amount of the loss without waiving the provision of the policy requiring the insured to submit proof of loss; but if the conduct of the company's agent, who is in charge of the adjustment of such loss, is such that the insured is given cause to believe that nothing further will be required of him, then such conduct is a waiver of this requirement. There is involved in this case, then, not so much a question as to what the law is, but whether or not the facts in the case bring it within the rule of the law as above stated.

It is to be noted that, at the time when the listing of the property was completed, with detailed statements as to the value of the articles, and Luke was about to leave the plaintiff, he said to plaintiff that it was not a question of how much or

how little he could give, but it was a question of getting it down to what it should actually be. It seems to us that there could be but one construction of this language, and that is that there was nothing further to be done except to make an exact determination of the amount to be paid by the company. When Luke said that that was the question, plaintiff was justified in believing that there was nothing further for him to do but to wait until that question, and that question alone, was determined. That such was the effect of the conduct of Luke is apparent from the telegram that was sent by the local agent to the general agents relative to the matter, which presumably could have been induced only by an inquiry from plaintiff as to when he could expect settlement to be made. Under these circumstances, we believe that the facts come within the rule, and that the conduct of defendant, through its adjuster, Luke, in examining the premises, in listing the property in detail, and the amount of the loss, in co-operation with the plaintiff, and in saying to the plaintiff in effect, that the only question to be determined was the amount of liability, was a waiver of proof of loss.

Upon the second ground the great weight of authority is to [2] the effect that, if the assured attempts to comply with the requirement of the policy as to notice and proof of loss, the receipt and retention of proof of loss by the insurer without objection constitutes a waiver of its right to object thereto as not satisfying the requirements of the policy. (26 C. J. 399, and cases cited.) While the exhibit was not sufficient to constitute proof of loss according to the requirements of the policy inasmuch as it did not set forth some of the matters required in such proof of loss, nevertheless it did constitute a complete proof of loss to the extent of showing to the defendant company what items were destroyed by the fire and value. It was thus a proof of loss to some extent, although not complete. However, defendant company accepted and retained it without objection and made no demand for any further proof. When the insured has attempted to make proof of loss, even

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though such attempt may be defective or insufficient, then the burden rests upon the insurer to make objection thereto, or it must be deemed to have waived the defect or insufficiency. It is not fair to the insured for the company to remain silent under such circumstances, allowing the insured to rest in the belief that the insurer is satisfied, and then, after the time for furnishing the proof of loss has expired, urge such defect or insufficiency to the prejudice of the insured. In this case the company had a statement showing the loss as completely as it was possible for plaintiff to give it, and exactly as worked out by the plaintiff and defendant's adjuster together, and, if defendant required anything more it should have so advised the insured. We think that the retention of the proof without objection as to defects or insufficiency was a waiver of any further proof of loss.

Upon the third ground it appears that, after the time for [3] furnishing proof of loss had expired, the company, in response to inquiry by the local agent, advised him by telegram that the matter of the adjustment of this loss was in the hands of Robert A. Luke, and confirmed the telegram by quoting it and further advising that all matters pertaining to the adjustment of loss would have to be taken up with Mr. Luke. It is evident from this telegram and letter that the company did not claim at that time any insufficiency of the proof, or that the proof had not been furnished within the time limited by the contract, but entirely ignored the matter of proof, stated the adjustment of the loss was in the hands of Mr. Luke, and thereby recognized its liability on the contract. "If insurer, after loss, distinctly admits or otherwise recognizes its liability to pay the claim, it constitutes a waiver of requirements of the policy as to notice and proof of loss." (26 C. J. 406, and cases cited.) If it was not satisfied with the proof of loss submitted, why did defendant not say so, instead of saying that it was in the hands of Luke for adjustment? Such attitude on the part of the company must be considered as a waiver of any defect or insufficiency in the proof of loss.

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Defendant, however, contends that, even though there was a [4] waiver of proof of loss or any defect or insufficiency therein, yet plaintiff was not entitled to recover in this action because the complaint does not allege any waiver. It alleges full performance of all the conditions of the contract, including particularly the requirement as to the furnishing of the proof of loss, but defendant urges that an allegation of performance is not established by proof of waiver. As waiver must be pleaded in order to sustain proof, we are satisfied that defendant's contention in this regard must be sustained. There are no allegations in the complaint of any facts establishing waiver upon either one of the three theories hereinbefore discussed. The nearest approach to a plea of waiver is found in the following allegations of the complaint: "That thereupon the defendant herein was duly notified of the loss sustained by this plaintiff on account of said fire, as by the terms of said policy provided, and the defendant herein did thereupon proceed to adjust the loss sustained by this plaintiff, and did appraise the agreed sum, value, and loss of this plaintiff at, to-wit, \$6,080.47, as by the terms of said policy it agreed to do." These allegations, however, are insufficient, for the reason that they omit to state the facts in connection with the adjustment whereby plaintiff was misled by defendant and caused to believe that no further act of his was required.

Defendant offered an instruction embodying, among other [5] things, the proposition that plaintiff cannot recover in this case unless he shall establish by a preponderance of the evidence the fact that he gave, and the company received, the proof of loss required by the policy. While under the pleadings such instruction may be proper, yet, in view of the facts hereinbefore set forth, the instruction would not be applicable. It, in effect, would amount to an instruction to the jury to render a verdict in favor of defendant upon this feature of the case regardless of the undisputed facts showing waiver.

Error is also assigned upon the ruling of the court in admitting in evidence a check given by plaintiff to defendant's local agent about three months after the fire in payment

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of the premium due upon this policy. This check was offered plaintiff upon the theory of waiver, and received in evidence by the court over the objection of defendant. We cannot see that this acceptance of the check can be construed as any waiver of any of the provisions of the policy, for the reason that defendant does not deny the contract and its obligations thereunder. Such being the case, it is entitled to hold the premium without waiving any of the conditions of the contract. We cannot see that the check was material for any purpose, but its admission was harmless error, as it could not be construed as in any way affecting the obligations of defendant in this case.

For the reasons herein given, the judgment and order overruling the motion for new trial are reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

ON MOTION FOR REHEARING.

(Decided January 23, 1922.)

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Plaintiff's petition for rehearing is denied. In connection with this petition our attention has been called to certain phraseology of the opinion from which it is suggested that misinterpretation of its meaning may result. In order to remove any doubt as to the meaning intended by the court in regard to these matters, we state that exhibit "A," referred to in the opinion, was received in evidence as a proof of loss

over the objection of defendant, the latter contending that it did not constitute any proof of loss. While upon the facts stated in the opinion relative to the conduct of Luke this court held that defendant waived its right to insist upon the failure to furnish proofs of loss, yet it must be understood that such conclusion is based upon the facts as set forth in the opinion, and does not preclude defendant from contradicting such facts upon a new trial. In stating that after the time required for the proof of loss the company announced "that the adjustment of the loss was in the hands of Mr. Luke, and thereby recognized its liability on the contract," the court did not lay down the general proposition that, merely because the company stated that the adjustment was in the hands of any certain person, it thereby recognized its liability, but merely that upon the evidence in the record before us, it waived the requirement as to proofs of loss.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

STATE ~~EX~~ REL. HOUSTON, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,984.)

(Submitted December 5, 1921. Decided December 13, 1921.)

[202 Pac. 756.]

Civil Officers—Removal—Proceedings Criminal in Nature—District Judges—Disqualification by Affidavit Under Fair Trial Law not Permitted.

1. *Held*, that proceedings for the removal of civil officers under section 9006, Revised Codes, as amended by Chapter 25, Laws of 1917, are criminal in their nature, and that therefore neither party has the right to file an affidavit disqualifying a district judge for imputed bias or prejudice under section 6315, Revised Codes, as amended by Chapter 114, Laws of 1909. (MR. JUSTICE HOLLOWAY dissenting.)

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Original application by the State, on the relation of William H. Houston, for Writ of Prohibition directed to the District Court of the Fourth Judicial District in and for the County of Missoula and Charles W. Pomeroy, Judge presiding. Proceedings dismissed.

Messrs. Mulroney & Mulroney and *Mr. F. C. Webster*, for Relator, submitted a brief; *Mr. E. C. Mulroney* argued the cause orally.

Mr. Wellington D. Rankin, Attorney General, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Relator is the duly elected, qualified and acting sheriff of [1] the county of Missoula. Wellington D. Rankin, as attorney general, filed an accusation in the district court of Missoula county accusing relator of misconduct in office and praying for his removal under the provisions of section 9006 of the Revised Codes, as amended by Chapter 25, Session Laws of 1917. The local judges, deeming themselves disqualified, called upon Honorable Chas. W. Pomeroy, judge of the eleventh judicial district, to preside at the hearing. Relator filed an affidavit of disqualification under the provisions of subdivision 4, section 6315, of the Revised Codes, as amended by Chapter 114 of the Laws of 1909. The attorney general filed a motion to have the affidavit stricken from the files, which was done, and thereupon Judge Pomeroy set the case for trial and announced his determination to retain jurisdiction thereof, and to hear the same. Relator then filed in this court his petition for writ of prohibition to restrain Judge Pomeroy from proceeding with the trial of the case, and to compel the reinstatement of the affidavit of disqualification. Order to show cause was issued. Upon return day, respondents filed their motion to quash on the ground that, upon the face of

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the application, relator is not entitled to the relief prayed for, and that the application does not state facts sufficient to warrant the granting of such relief.

It is conceded by both parties that the statute authorizing a party to file a disqualifying affidavit does not apply to cases of criminal nature. The question involved here is whether the proceeding in the district court is in its nature civil or criminal. If it is the former, then the affidavit of disqualification was properly filed, and Judge Pomeroy was disqualified from hearing the case; but, if the latter, then the disqualifying affidavit was ineffectual for any purpose, and Judge Pomeroy was justified in proceeding with the trial.

In determining this question, we do not consider that it is necessary to go outside of the Constitution and statutes of this state and the former decisions of this court. Section 17 of Article V of the state Constitution provides that the governor and other state and judicial officers, except justices of the peace, shall be liable to impeachment for high crimes and misconduct and malfeasance in office. Section 18 of the same Article provides that all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law. The Constitution provides that impeachment shall be tried by the Senate sitting for that purpose, but the Constitution leaves it entirely to the legislature to provide in what manner actions for the removal of other officers shall be brought and tried. It is established that impeachment proceedings are criminal in their nature. (29 Cyc. 1413.) Inasmuch as there cannot be any substantial difference in character between a proceeding brought against a certain class of officers before the Senate for removal, and one brought for the same object before some other tribunal in such manner as may be designated by the legislature, it must be held that the actions are essentially of the same nature. As impeachment proceedings are criminal in nature, as already pointed out, then, as a natural conse-

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quence, it follows that proceedings to remove other officers are likewise criminal in their nature.

A reference to the statutes confirms the theory that such was the understanding of the legislature. The section under which the proceedings are brought, being section 9006, Revised Codes, as amended by Chapter 25, Laws of 1917, reads as follows: "When an accusation in writing, verified by the oath of any person, is presented to the district court, alleging that any officer within the jurisdiction of the court has been guilty of knowingly, willfully, and corruptly charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has willfully refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than forty days from the date on which the accusation was presented, must proceed to hearing, in a summary manner, or trial, upon the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; provided, if the charge be for the charging and collecting of illegal fees or salaries, the trial must be by jury if the defendant so demands, and conducted in all respects and in the same manner as the trial of an indictment for a misdemeanor, and the defendant shall be entitled, as a matter of defense, to offer evidence of, and the jury under proper instructions shall consider, his good faith or honest mistake, if any be shown, and the value received by the state, county, township, or municipality against whom the charges or fees were made. If, upon such hearing or trial, the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and for such costs as are allowed in civil cases; and if the charge is not sustained, the court may enter a judgment against the complaining witness for costs as are allowed in civil cases." This section is included within a Chapter entitled: "The Removal of Civil

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Officers otherwise than by Impeachment.” The first section of the Chapter provides that: “All officers not liable to impeachment are subject to removal for misconduct or malfeasance in office, as provided in this Chapter.” (Sec. 8991.) Following the section last quoted appear two methods for the removal of officers, one method to be used in certain cases, and the other method in certain other cases. The first method provides that an accusation against the officer for willful or corrupt misconduct or malfeasance in office may be presented by the grand jury, and then provides for subsequent proceedings, including the trial and judgment. The second method is found in the section under which the proceedings in the district court were commenced. Inasmuch as the object in both proceedings was the same, and they differed only in the method of accomplishing such object, and inasmuch as both were included in the same Chapter and under the same heading, and were included within the Penal Code, there is substantial reason for believing that it was the intent of the legislature to characterize these proceedings as criminal in nature.

As was stated in the case of *State ex rel. Brandegee v. Clements*, 52 Mont. 57, 155 Pac. 271, involving the question as to whether or not *habeas corpus* proceedings were criminal in nature, the essential nature of a remedy is not to be determined solely by its classification in the Codes; yet “those circumstances are to be considered but they are not to be given weight beyond their due.” The definition by the Code of “crime” is significant in this case. Section 8107 of the Revised Codes defines crime as follows: “A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: 1. Death. 2. Imprisonment. 3. Fine. 4. Removal from office; or, 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state.”

Section 8911, Revised Codes, provides that criminal actions shall be prosecuted as follows: “Every public offense must be

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prosecuted by indictment or information, except—1. Where proceedings are had for the removal of civil officers of the state. * * *

Revised Codes, section 9102, provides that "All public offenses triable in the district courts must be prosecuted by indictment or information, except as provided in the next section." The next section reads as follows: "When the proceedings are had for the removal of district, county, municipal, or township officers, they may be commenced by an accusation or information, in writing, as provided in sections 8992 (1531) and 9000 [9006?] (1545) of this Code." From these statutory references to the subject of removal from office, it is clear that the proceedings involving removal from office were deemed by the legislature to be criminal in character. Removal from office is included as a part of the definition of a crime in certain cases, and it is expressly exempted from the class of criminal cases to be prosecuted by indictment or information, which exception would be unnecessary if the proceeding was civil in character.

This court has had occasion to construe this section in the following cases: *State ex rel. Rowe v. District Court*, 44 Mont. 318, Ann. Cas. 1913B, 396, 119 Pac. 1103; *State ex rel. McGrade v. District Court*, 52 Mont. 371, 157 Pac. 1157; *State ex rel. Payne v. District Court*, 53 Mont. 350, 165 Pac. 294. In the *Rowe Case*, after discussing section 9006 in connection with the other provisions in the same Chapter for removal of civil officers, the court, through Mr. Chief Justice Brantly, came to this conclusion: "It is evident that the legislature intended to make this proceeding a *quasi*-criminal prosecution, both because the section is found in the Penal Code and because it imposes as a punishment removal from office." In the *McGrade Case*, considering the same subject matter, the court, through Mr. Chief Justice Brantly, designated the nature of the proceeding as follows: "The proceeding, though it may be instituted by a private person, is a public proceeding, and, except that it is summary in its nature, is to be classed as a

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prosecution for crime. [Citing cases.] In *State ex rel. Rowe v. District Court, supra*, it was referred to as a *quasi*-criminal proceeding; yet, since under section 9006 the result of a conviction is removal from office, and this is defined by section 8107 as a punishment for a crime, the qualifying term '*quasi*' might as well have been omitted."

It is contended by relator that the *Payne Case* in effect overrules the decisions of this court in the *Rowe* and *McGrade Cases*. We are unable to agree with the contention of counsel in this regard. In the *Payne Case*, the section was considered in connection with the claim that the Act was unconstitutional because it attempts to authorize a prosecution for crime by a private individual, and the trial and conviction of the accused upon a summary hearing without a jury, while section 8, Article III, of the Constitution provides that all criminal actions in the district court, except those on appeal, shall be prosecuted by information or indictment. After holding that: "'Criminal prosecutions,' as those terms are employed in the Constitution, refer to prosecutions for offenses which were crimes at common law, and doubtless to statutory offenses," Mr. Justice Holloway, speaking for the court, used this expression: "The accused is not entitled to a trial by jury, and it is not a criminal action in the sense that the public prosecutor must conduct the proceedings." We cannot say that this holding of the court is in any sense inconsistent with the decisions in the *Rowe* and *McGrade Cases*. The *Payne Case* does not hold that such a proceeding is not criminal in its nature, but merely that it is not a criminal action in the sense that the public prosecutor must conduct the proceedings. This decision is in harmony with the holding of this court in *State ex rel. Flynn v. District Court*, 24 Mont. 33, 60 Pac. 493, in which it was decided in a contempt case that, while the action was criminal in nature, it is not to be regarded as a "criminal offense," to be "prosecuted only by complaint, information or indictment, as laid down by section 8 of Article III of the state Constitution, but rather as a special proceeding of a

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criminal character—in that sense it is a public offense, yet it is not one a prosecution for which is exclusively controlled by constitutional limitations circumscribing methods of prosecution of strictly criminal offenses. (*Williamson's Case*, 26 Pa. St. 19.)”

In view of the statutory provisions, and their interpretation by this court in its previous decisions, it must be held that proceedings for the removal of civil officers under section 9006, as amended, are criminal in their nature, and, being criminal in their nature, neither party has the right of filing a disqualifying affidavit under the provisions of subdivision 4, section 6315, as amended.

For the reasons herein stated, it is ordered that the motion to quash be sustained and the proceedings dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICE COOPER concur.

MR. JUSTICE GALEN: This court has by repeated decisions held proceedings for the removal of public officers, under section 9006 of the Revised Codes, to be criminal in nature, rather than civil. Were the question a new one, I should place such proceedings in the category of civil actions; however, in application of the doctrine of *stare decisis*, I concur.

MR. JUSTICE HOLLOWAY: I am unable to agree with my associates that the conclusion announced by them can be justified upon any or all of the grounds stated.

1. Removal proceedings under section 9006 are assimilated to impeachment proceedings only to the extent that both look to the same end—the removal of an unfaithful officer. Beyond that there is not any similarity between them. If impeachment proceedings, under the Constitution of this state, are criminal proceedings, then section 17, Article V, is in direct conflict with section 18, Article III, a consequence not per-

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missible if avoidable under any recognized rule of construction, and it can be avoided only by holding that impeachment proceedings are not criminal in character; and therefore a person ousted from office thereby may be prosecuted for the same offense.

Impeachment proceedings are essentially judicial proceedings under all of the authorities (Pomeroy's Constitutional Law, 118), whereas the power to remove a civil officer by summary proceedings is in its nature political, and has reference exclusively to the polity of government (*People ex rel. Clay v. Stuart*, 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091). It may be conferred upon the governor, upon a court of inferior and limited jurisdiction, or upon a board of laymen acting in the most informal manner. (*State ex rel. Payne v. District Court*, 53 Mont. 350, 165 Pac. 294.) Indeed, the very power to remove under section 9006 is conferred by statute upon a city council, so far as city officers are concerned. (Sec. 3236, Rev. Codes; *State ex rel. Working v. Mayor*, 43 Mont. 61, 114 Pac. 777; *State ex rel. Ryan v. Board*, 45 Mont. 188, 122 Pac. 569.) It follows that removal from office is not essentially a judicial remedy, for, if it is, it can be enforced only by a court or judicial officer (sec. 8077, Rev. Codes), and it would be beyond the power of the legislature to confer the authority upon any other body (sec. 1, Art. IV, Constitution).

I insist, therefore, that impeachment proceedings furnish no basis from which to argue that the proceeding under section 9006 is criminal in character.

2. Neither is the fact that section 9006 is found in the Penal Code of the slightest consequence. The arrangement of the Codes—the assignment of a particular Act to one Code or to another—is simply the work of the commissioner appointed for that purpose. (*State ex rel. Brandegge v. Clements*, 52 Mont. 57, 155 Pac. 271.) It will not do to say that the rights and liabilities of the citizens of this state are made to depend upon the judgment, the whim, caprice, the inadvertence or mistake of the Code commissioner, and the very legislature which en-

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acted the Codes forfended against any such ridiculous conclusion. Section 3562, Revised Codes, provides: "The arrangement and classification of the several parts of said Codes have been made for the purpose of convenience and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn therefrom." In view of this language I submit that this court is without authority to say that a specific legislative intention is manifested by the position in the Codes which a statute happens to occupy.

The majority opinion is not only contrary to the express declaration of the statute (sec. 3562), but in conflict with the former decisions of this court. The statutes governing proceedings punishing contempt of court are found in the Code of Civil Procedure (secs. 7309-7322), but the proceedings have been declared to be of a criminal nature, as they are manifestly. (*State ex rel. Flynn v. District Court*, 24 Mont. 33, 60 Pac. 493; *State ex rel. Gemmell v. Clancy*, 24 Mont. 359, 61 Pac. 987; *State ex rel. B. & M. v. Harney*, 30 Mont. 193, 76 Pac. 10; *State ex rel. Webb v. District Court*, 37 Mont. 191, 15 Ann. Cas. 743, 95 Pac. 593.)

Again, either house of the legislative assembly may punish for contempt, but the procedure is found in the Political Code (sec. 97, Rev. Codes). On the other hand, the *habeas corpus* statutes are contained in the Penal Code (secs. 9630-9662), but the proceedings are nevertheless of a civil nature. (*State ex rel. Brandegee v. Clements*, above.)

I insist, therefore, that no presumption can be drawn from the fact that section 9006 is contained in the Penal Code.

3. The fact that an officer proceeded against under section 9006 may be removed from office does not indicate that the legislature deemed the proceeding to be criminal in character. Sections 20 and 21, Chapter 143, Laws of 1917, provide that certain officers, including a sheriff, may be removed from office for failure to discharge the duties imposed by the prohibition law, but the proceeding is declared by the legislature to be

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civil in its nature, and could not be construed to be anything else.

4. Conceding that this court has heretofore expressed the opinion that the proceeding under section 9006 is criminal in its nature, it does not follow that those decisions should be adhered to if erroneous. No pride of opinion should prevent this court from correcting its own mistakes. In *State ex rel. Rowe v. District Court*, 44 Mont. 318, Ann. Cas. 1913B, 396, 119 Pac. 1103, it was said that the proceeding is *quasi-criminal*, and two cases from California were cited in support of the conclusion. (*Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615, and *In re Curtis*, 108 Cal. 661, 41 Pac. 793.) Each of those cases was decided in view of a constitutional provision materially different from our section 18, Article V, and under a statute which attaches a penalty of \$500 in addition to removal from office, and that penalty has been determined to be a fine. (*Wheeler v. Donnell*, 110 Cal. 655, 43 Pac. 1.)

The supreme court of California has held repeatedly that the proceeding for the summary removal of an officer is criminal in character—criminal to the extent that the accused cannot be compelled to be a witness against himself (*Wheeler v. Donnell*, above), and the proceedings must be conducted in the name of the state (*Cline v. Superior Court*, 184 Cal. 331, 193 Pac. 929). The reason assigned by the California court for its decisions is that punishment is the primary purpose of the California removal statute, but I do not believe that the majority of this court will follow the California doctrine to its logical conclusion, and, if not, then the holding in the *Rowe Case* is without any foundation. In *State ex rel. McGrade v. District Court*, 52 Mont. 371, 157 Pac. 1157, the court merely followed the *Rowe Case*, and to the same wrong conclusion. In *State ex rel. Payne v. District Court*, above, we disapproved the decisions in the *Rowe* and *McGrade Cases* to the extent of holding that the proceeding is a special statutory one, subject to the analysis there made. That analysis upon

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the very face of it demonstrates that the proceeding is not criminal in character.

The fact that one removal statute (secs. 20, 21, Chap. 143, Laws 1917) is declared by the legislature to be civil in character is not a controlling consideration, and neither is it of consequence that in sections 8911 and 9102, Revised Codes, the failure of an officer to perform the duties of his office is referred to as a "public offense." In order to determine whether the proceeding under section 9006 is criminal in character, the test to be applied is this: Is punishment the primary purpose of the proceeding?

I undertake to say that there cannot be any difference of opinion upon this proposition: That every criminal proceeding has for its real object and end the punishment of the offender. (*State ex rel. Brandegee v. Clements*, above; *Jernigan v. Commonwealth*, 104 Va. 850, 52 S. E. 361; *Maben v. Rosser*, 24 Okl. 588, 103 Pac. 674.) Except in California and a few other states having similar statutes, which do look primarily to the punishment of the offender, proceedings for the summary removal of civil officers are held generally to be civil in character, designed to rid the public of unfaithful servants. (*People v. Meakim*, 133 N. Y. 214, 30 N. E. 828; *State ex rel. Johnson v. Foster*, 32 Kan. 14, 3 Pac. 534; *Territory v. Sanches*, 14 N. M. 493, 20 Ann. Cas. 109, 94 Pac. 954; *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172; *Oesterreich v. Fowle*, 132 Mich. 9, 92 N. W. 497; *State ex rel. Mitchell v. Medler*, 17 N. M. 644, Ann. Cas. 1915B, 1141, 131 Pac. 976; *Skeen v. Craig*, 31 Utah, 20, 86 Pac. 487; *State v. Brown*, 24 Okl. 433, 103 Pac. 762; *State v. Borstad*, 27 N. D. 533, Ann. Cas. 1916B, 1014, 147 N. W. 380.) In *People v. Meakim*, above, the court said: "The simple removal of an officer from office is not a punishment for crime unless it is a removal in consequence of a conviction for a crime. It cannot be said that a determination made in a civil proceeding to remove a public officer for neglect or malfeasance in office is in any proper sense a conviction of such officer of a crime. Nor can it be said that

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the provision for removal from office contained in section 109 is a provision in any proper sense for the punishment of the officer removed."

In *State ex rel. Johnson v. Foster*, the Kansas court, considering a proceeding for the removal of civil officers, said: "It is not an action for which any punishment by imprisonment or fine may be inflicted upon the defendant. It is not an action for punishment at all. The purpose of the proceeding is to remove the defendant from office, and this may be done by a civil action in the manner provided in the Code of Civil Procedure."

The case of *Territory v. Sanches*, above, is reported in 20 Ann. Cas. 109, and in an extensive note the author says: "There is some conflict in the authorities with respect to whether a proceeding for the removal of a public officer is of a civil or a criminal nature. Much of this conflict may be traced to a difference in the statutes governing such proceedings. The rule followed in a majority of the jurisdictions is that a proceeding for the removal of a public officer is not a criminal proceeding; that the object of such a proceeding is to protect the public from corrupt officials, not to punish the offender."

The removal provided for in section 9006 is incidental only, to pave the way for the installation of faithful officers. And there is not any reason why removal should be considered punishment, and every reason why it should not be so considered. The willful neglect of official duty is made a crime by section 8281, Revised Codes, and adequate punishment is provided. It could not be contended seriously that one removed from office under the proceeding authorized by section 9006 could plead the judgment in bar of an ordinary criminal prosecution for the same offense, and yet, if removal from office is a punishment for the offense committed, then a person may be twice put in jeopardy for the same offense, notwithstanding the constitutional guaranty to the contrary (sec. 18, Art. III). The only reason why the judgment authorized by

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section 9006 could not be pleaded in bar is that the proceeding is not criminal in character.

The proceeding does not partake of the nature of a criminal trial. There is no indictment, information or criminal complaint; no warrant, arrest or bail. The accused is served as in a civil action. No fine or imprisonment can be imposed. The judgment cannot extend beyond removal from office, and the ousted officer is not rendered ineligible for re-election to the same position. Finally, as indicative of legislative intent, section 9006 provides for the entry of an ordinary judgment, and that costs shall be allowed as in civil actions.

All judicial remedies are embraced in two classes, actions and special proceedings (sec. 8078, Rev. Codes), and actions are of two kinds, civil and criminal (sec. 8081). Section 9006 does not provide for an action, either civil or criminal. The proceeding indicated is not a civil action because it is not a controversy waged between parties, within any definition of a civil action. If it is a criminal action, then it must be prosecuted by indictment or information (Const., Art. III, sec. 8), and the accused is entitled to a jury trial (Const., Art. III, sec. 16). But it is not a criminal action, and no one will contend that it is.

Under our system of laws, every judicial remedy, which is not an action, is a special proceeding. (Sec. 8078, Rev. Codes.) But the special proceeding authorized by section 9006 is not a special proceeding of a criminal nature because it does not look primarily to punishing the derelict officer. There is but one other class remaining—a special proceeding of a civil nature, and to that class this proceeding belongs by every rule of reason and authority. But, if the true character of the proceeding is doubtful, I insist that the doubt should be resolved in favor of the party against whom the proceeding is directed, to the end that it may be heard by a judge whose impartiality is not questioned. In this connection the proper construction of the "fair trial" law (subd. 4, sec. 6315, Rev. Codes, as amended) is pertinent.

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In *State ex rel. Bank v. District Court*, 50 Mont. 259, 146 Pac. 539, we said: "However much the statute [sec. 6315—4] may be abused, however much the courts may be imposed upon under its sweeping provisions, it is still the law of this state, binding upon courts and judges, and to be administered according to its true intent and purpose."

In *State ex rel. Carroll v. District Court*, 50 Mont. 506, 148 Pac. 312, this court said: "That a right may be conferred by statute; that when so conferred, it is entitled to judicial recognition; that such recognition cannot be withheld nor the right abridged because it is subject to abuse; and that subdivision 4 of section 6315, Revised Codes, as amended, is such a statute and confers such a right—are propositions too well settled for discussion."

In *Gehlert v. Quinn*, 38 Mont. 1, 98 Pac. 369, it was held that section 6315—4, the so-called "fair trial" law, "should be liberally construed, with a view to effect its object and promote justice." Now, what was the object of the fair trial law? It could have but one purpose—to relieve a party in court from the necessity of having his cause passed upon by a biased or prejudiced judge. If it was necessary to have such a statute applicable to civil cases wherein either party is entitled to a trial by jury, how much greater the necessity for such an Act to relieve one who is a party to a proceeding wherein he is not entitled to a jury trial, and has not the right of appeal if the proceeding is criminal in character.

It is a monstrous doctrine announced by the majority, that this relator whose civil rights may be invaded, and who is not entitled to a jury trial, must nevertheless be tried by a judge whom he believes to be so far biased and prejudiced against him that he cannot have a fair trial. The doctrine is announced three centuries too late. It might have met with universal approval in the dark ages, but it has no place in the jurisprudence of the twentieth century. It denies to relator a fair trial; but the doctrine itself is no more startling

than the attitude of a judge who insists that he shall try the cause of one who believes him to be unfair and who makes known his belief under the sanction of an oath.

Neither is it an argument in favor of the construction of section 9006, adopted by the majority, that a defendant in an ordinary criminal action may not disqualify a judge except upon proof of his prejudice. (Sec. 9219, Rev. Codes.) The law throws about such a defendant every safeguard necessary for his adequate protection—safeguards which more than compensate for his inability to invoke the provisions of section 6315.

COOK ET AL., APPELLANTS, v. NORTHERN PACIFIC RY.
CO., RESPONDENT.

(No. 4,547.)

(Submitted October 27, 1921. Decided December 19, 1921.)

[203 Pac. 512.]

*Carriers — Livestock Shipments — Parol Testimony — Varying
Terms of Contract—Principal and Agent.*

Carriers—Livestock Shipments—Published Tariffs Part of Contract.

1. The published tariffs of a carrier, filed with and approved by the Interstate Commerce Commission, requiring a notation on the contract of shipment and the waybills of points at which livestock were to be fed and watered, form a part of the contract of shipment and are conclusive on the shipper (as well as the carrier), whether he has actual knowledge of them or not.

Same—Prior Oral Negotiations Merged in Contract—Parol Evidence—Varying Terms of Writing.

2. Prior oral negotiations and directions as to points at which livestock should be stopped for resting and feeding were merged in the contract of shipment, where it and the waybills bore notations stating the points at which stops were to be made, and therefore parol testimony of directions to make other stops was incompetent as an attempt to vary the terms of the written contract.

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Same—Contract—Custom Varying Writing—Evidence—Inadmissibility.

3. Where the terms of a contract of shipment of livestock were clear and explicit as to where stops should be made for feeding and resting, parol testimony to the effect that it was customary for shippers to have them stop for those purposes at another point was inadmissible.

Same—Livestock Shipment—Ostensible Authority of Attendant to Change Contract—Evidence—Insufficiency.

4. A livestock shipment contract on its face bore a notation that the lambs constituting the shipment should be stopped at a certain point for feed and rest. The attendant in charge had no authority, either actual or ostensible, to change the contract in any particular. The published tariffs forming a part of the contract provided that the points at which animals were to be stopped could not be changed otherwise than upon written instruction of the owner or his authorized agent, the question of ownership or agency to be determined by proper identification. The attendant, with the bill of lading in his possession, directed defendant carrier's agent in writing to change the notation as to the place where the stop should be made, stating that he was the person in charge. *Held*, that the burden of proving that the attendant had ostensible authority to make the change in the contract was upon defendant carrier, that the showing made to the agent by the attendant as to his authority to make the change was insufficient, and that therefore the court properly struck all evidence relating to the change.

Appeals from District Court, Yellowstone County; A. C. Spencer, Judge.

ACTION by H. G. Cook and another against the Northern Pacific Railway Company. Both parties appeal from the judgment and from orders denying them new trials. Affirmed.

Messrs. Shea & Wiggenhorn, for Plaintiffs, submitted a brief; *Mr. Thos. F. Shea* argued the cause orally.

The testimony ordered stricken by the court conclusively established the fact that in all shipments of sheep from Montana and other western states to Chicago, Illinois, there is a well-established custom that such sheep are unloaded for the purpose of feeding and billing at a station outside of Chicago, and that on the Burlington Railroad such station was in Montgomery, Illinois, and also that such custom prevails regardless of whether or not there is any notation to this effect in the shipping contract or in the waybills pertaining thereto. Evi-

3. Variation of written contract for shipment of goods by parol evidence, see note in *Ann. Cas.* 1913A, 932.

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dently, in sustaining defendant's motion, the court proceeded upon the theory that such evidence tended to vary the terms of a written instrument. That such was not the effect of the evidence is well established by our statutes and decisions. Likewise, the statutes and decisions of our own state conclusively establish that such evidence is admissible, not for the purpose of varying the terms of a written contract, but to explain the intention and purpose of the parties at the time of the making of such contract. (See sections 5036, 7877 and 7887, Rev. Codes.) The two latter sections were construed in *Parham v. Chicago etc. Ry. Co.*, 57 Mont. 492, 189 Pac. 227. In that case the facts and also the questions arising thereupon were substantially identical with the case in question. In that case the shipment was from Harlowton, Montana, to Chicago, Illinois. The contract of shipment was silent upon the question of a stopover at Stockdale. However, there was a notation upon the waybills requiring such stopover. But in passing upon this phase of the case the court stated that the waybills were no part of the contract and were made merely for the purpose of instructing the agents of the defendant railway company. Also in the above case the plaintiff offered evidence establishing the custom of stopping at Stockdale to regain shrinkage, etc. Defendant contended that such evidence tended to vary by parol; the court held otherwise.

The reasoning employed by the court in the above case is applicable to the case in question. The plaintiff has pleaded the custom and has established the same by competent evidence and is entitled to have the question of custom and the testimony thereon submitted to the jury. That our statutes and the decisions in *Parham v. Chicago etc. Ry. Co.*, above, are in accordance with the general law on the subject, see *Corpus Juris*, No. 10, page 211, wherein the rule is stated as follows: "Custom as affecting a contract: A custom or usage known to the shipper as to the means or method of transportation will be binding upon the parties as a part of the contract of shipment, when not contrary to its terms"; and see further:

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Savage v. Salem Mills Co., 48 Or. 1, 85 Pac. 69; *Seavey v. Shurick*, 110 Ind. 494, 11 N. E. 597.

Messrs. Gunn, Rasch & Hall and *Messrs. Johnston, Coleman & Johnston*, for Respondent and Appellant Railway Company, submitted briefs; *Mr. E. M. Hall* argued the cause orally.

The intent of the parties was clearly expressed in the contract and also in the bills of lading. The provisions of the contract are definite and certain. So the only effect of evidence as to custom or prior oral directions in this case would be to contradict or vary the legal import of an unambiguous written instrument. (*Brockway v. Blair*, 53 Mont. 531, 165 Pac. 455; *Frank v. Butte etc. Co.*, 48 Mont. 83, 135 Pac. 904.) What was said about the contracts in the cases above applies equally to the livestock contracts here involved. (*Wells Fargo Express Co. v. Fuller*, 4 Tex. Civ. 213, 23 S. W. 412; *Marks and Shields v. Chicago, R. I. & P. Ry. Co.*, 184 Iowa, 1352, 169 N. W. 764; 10 C. J., sec. 261.) Section 5340 of the Revised Codes provides: "A passenger, consignor, or consignee, by accepting a ticket, bill of lading or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." (See, also, *Sanden v. Northern Pac. Ry. Co.*, 43 Mont. 209, 34 L. R. A. (n. s.) 711, 115 Pac. 408; *Brian v. Oregon S. L. R. R. Co.*, 40 Mont. 109, 20 Ann. Cas. 311, 25 L. R. A. (n. s.) 459, 105 Pac. 489; *St. Louis & S. F. Ry. Co. v. Ladd*, 33 Okl. 160, 124 Pac. 461.) A written contract supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. (Secs. 5018 and 7873, Rev. Codes; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873; *Ford v. Drake*, 46 Mont. 314, 127 Pac. 1019; *Armington v. Steele*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115; *Pritchett v.*

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Jenkins, 52 Mont. 81, 155 Pac. 974; *Brockway v. Blair*, 53 Mont. 531, 165 Pac. 455.)

The plaintiffs were bound by the act of their agents in signing the livestock contracts. (10 C. J., sec. 187; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279, 63 N. E. 245, 64 N. E. 647.)

These written orders, signed by the holder of the bill of lading (Dauer), modified the original contracts and waybills, by eliminating the notation to stop for feed at Montgomery. Such modification was made in compliance with the provisions of the published tariff applicable thereto, and also in accordance with section 5067 of the Revised Codes of Montana; also in accordance with the well-established custom of railroads and in commercial circles to recognize the person producing and holding the bill of lading as the one entitled to control and direct the handling of the freight. (*Ryan v. Great Northern Ry. Co.*, 90 Minn. 12, 95 N. W. 758; see, also, secs. 29 and 32 of the Act of Congress of August 29, 1916, relating to bills of lading; secs. 8604 (o) and 8604 (pp), U. S. Comp. Stats. 1916.)

Manifestly, the bill clerks of the railway company, upon receiving in the regular way these orders eliminating the notation to stop at Montgomery, were warranted in making out the livestock contract or bill of lading over the Burlington without any such notation, and the conductor on the Burlington train was justified in relying upon such bill of lading and waybill, without any notation to stop at Montgomery, and was not negligent in carrying the shipment on through to Chicago. If the plaintiffs, by the want of ordinary care, allowed the man in charge to believe he possessed such authority, or if by the want of ordinary care they caused or allowed the billing clerks at South St. Paul to believe he possessed such authority, they are bound by his acts; and, of course, could not recover any damages that may have been sustained by reason thereof. (See secs. 5430–5432, Rev. Codes; 2 C. J., “Agency,” secs. 211, 212; *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, 94 Am. St. Rep. 279, 63 N. E. 245, 64 N. E. 647.)

In the absence of statute, or of special instructions to the carriers, limiting the authority of the man in charge of this shipment, he was clearly acting within the scope of his authority. (*Squire v. New York Cent. R. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Hill v. Boston etc. R. Co.*, 144 Mass. 284, 10 N. E. 836; *Armstrong v. Chicago, M. & St. P. Ry. Co.*, 53 Minn. 183, 54 N. W. 1059; *Willard v. Chicago & N. W. Ry. Co.*, 150 Wis. 234, 136 N. W. 646; *Donovan v. Wells Fargo & Co.*, 265 Mo. 291, 177 S. W. 839; *Atchison, T. & S. F. Ry. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. Rep. 380 [see, also, Rose's U. S. Notes]; *Zimmer v. New York Cent. & H. R. R. Co.*, 137 N. Y. 460, 33 N. E. 642.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an action by plaintiffs to recover from the defendant \$6,835.54 upon two causes of action for damage to shipments of lambs from points on its railway in Montana, to Chicago, Illinois.

The first cause of action alleges \$1,240.30 damage to six cars of lambs shipped from Bozeman, in Gallatin county, on September 15, 1916. The second alleges \$5,595.24 damages to three cars of lambs shipped from Deer Lodge, six cars from Gold Creek, both in Powell county, and nine cars from Philipsburg, in Granite county, on October 16, 1916. Except as to the dates and number of cars, the averments in the two causes of action are substantially identical.

It is alleged that under the rules and regulations of the Chicago, Burlington & Quincy Railroad Company, defendant's connecting line between St. Paul and Chicago, referred to hereafter as the Burlington Railroad Company, plaintiffs had the right to order the lambs stopped in transit to feed and fatten at Montgomery, Illinois, for a period not exceeding six months; that in the exercise of this right, the plaintiffs ordered the defendant and its connecting carrier to stop the lambs to feed

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at that place before being sent into Chicago for market; that when such animals are shipped from Montana points to the Chicago market, it is customary to stop them at some station near Chicago for feeding in order to allow them to regain flesh lost by shrinkage during their transit and to finish them for the Chicago market; that for this purpose they are commonly fed at Montgomery, Illinois, all of which was and is known to the defendant and the owner of its connecting line from St. Paul to Chicago; that it was the duty of the Burlington Railroad Company to stop the lambs at Montgomery; that in violation of plaintiffs' order, the lambs were not stopped at Montgomery, but were carried by that station directly to the stockyards in Chicago, reaching there and being forced upon the market in a shrunken condition, to plaintiffs' loss and damage in the amounts claimed.

The answer admits that the lambs were consigned for shipment by the defendant and its connecting line to Chicago. It alleges that they were accepted by defendant for carriage to their destination subject to the rates and tariffs filed by the defendant with, and approved by, the Interstate Commerce Commission, and upon the terms and conditions stated in a special contract in writing entered into by the plaintiffs and defendant upon a sufficient consideration—a special reduced rate of carriage as provided for in said tariffs—duly signed by the plaintiffs or their agent, and by the agent of the defendant, and accepted by the plaintiffs at the time the lambs were delivered to the defendant. All the other allegations of the complaint are put in issue. Upon a trial to a jury, plaintiffs had a verdict and judgment for \$3,892.32, together with their costs and disbursements. Plaintiffs and defendant each moved for a new trial. The motions were denied. Both have appealed from the judgment and the orders denying their respective motions for a new trial.

At the trial it appeared that all the shipments were accepted by the defendant under special contracts reading from the several stations mentioned, to Rosenbaum Bros. & Co., at Chi-

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cago; those from Philipsburg, Gold Creek and Deer Lodge being carried on one train, and the one from Bozeman on another. None of the contracts called for stops in transit, except that the one covering the six cars from Bozeman had on the face of it a notation requiring stops at Mandan, North Dakota, and South St. Paul, Minnesota, and the one from Philipsburg calling for a stop for feeding at Montgomery, Illinois. Each contract contained these stipulations: "The shipper will load, unload, care for, feed and water the stock while in the possession of the company and will furnish to go with the stock for that purpose, one or more attendants, according to the rules of the company, and if the shipper fails, for any reason, to furnish such attendant, whatever shall be done by the company with respect to the care of the stock in transit will be considered as done by it at the request and as representative of the shipper. * * * All the provisions of this contract are to be controlling between the parties hereto as to said shipment without regard to whether the transportation of such shipment has already been commenced or undertaken by said company." The waybills all contained directions for stops at Mandan and South St. Paul, but at no other intermediate point, except that the waybills for the cars shipped from Philipsburg contained a direction to stop for feed at Montgomery.

The published tariffs filed with and approved by the Interstate Commerce Commission contain these provisions regarding the privilege of stops for feeding, *etc.*: "Attention is called to the fact that agents should note on livestock contracts points at which shippers desire stops for feeding and water. * * * When shippers give instruction for stops for feed * * * notation must be made across the face of the contract. Also on waybills, designating at what points stops are desired. Shippers should be given to understand that where contracts bear no notation to stop, no stop will be made except as required by the regulations of the Bureau of Animal Industry, United States Department of Agriculture, or other state or

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federal laws. In naming stopping points, shippers must be limited to intermediate points designated by this company for that purpose and in accordance with current routing instructions. * * * Shippers of livestock should be given to understand that destination or points at which animals are to be stopped for feed, as originally shown on the waybill, cannot be changed except upon written instructions of the owner or his authorized agent, the question of ownership or agency to be determined by proper identification. In event of such written request being made, it shall be attached to the waybill, also indorsement made on contract and signed by the party giving the order."

It appears from the evidence that when the lambs from Deer Lodge, Gold Creek, and Philipsburg arrived at St. Paul, one William M. Dauer, the person then apparently in charge of and accompanying the lambs, who had the original contract of the defendant in his possession, gave shipping orders to Ronkin, billing clerk of the St. Paul Union Stockyards Company, for the movement of the lambs from St. Paul to Chicago over the Burlington Railroad. These shipping orders, signed by Dauer, were then turned over to the billing clerk of the joint railway offices at South St. Paul for his information and guidance in making out the contracts covering the shipments from that point to Chicago over the Burlington Railroad. The contracts from that point to Chicago were made out by him. The orders signed by Dauer eliminated the notation on the contract of the stop for the Philipsburg lambs at Montgomery. It was also canceled on the waybills by a line drawn through it in ink, presumably by the billing clerk. The contracts over the Burlington Railroad were thereupon drawn in accordance with these orders and contained no notation for stop at Montgomery.

The plaintiffs were permitted, over objection of defendant, to introduce evidence of oral directions by plaintiff Cook, or his agents who assisted to load the lambs at the several shipping points, to the local agents of the defendant before

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the several contracts were signed and the waybills made out. The purpose of this was to show that orders were given to the defendant by plaintiff and his agents to note upon the contracts and waybills that the lambs were to be stopped at Montgomery for feeding. Evidence was also admitted over objection tending to show that it is the custom of persons shipping lambs over the defendant's railroad from Montana points to Chicago over the Burlington Railroad, to have them stopped at Montgomery for rest and feeding before they are put upon the market at Chicago. The evidence on these points was in conflict. The several agents of the defendant testified in effect that they made out the several contracts and waybills as they were directed, making such notations on the contracts as the plaintiffs or their agents desired. Other witnesses testified that it was frequently the case that lambs were transshipped from South St. Paul to Chicago over the Burlington Railroad without stopping at any intermediate point.

Evidence was introduced by defendant tending to show that frequently orders are given by shippers at South St. Paul, changing the billing at these points so that lambs are carried from that place through to Chicago without stop. There was also evidence to the effect that when a shipper puts a man in charge of stock, the latter is supposed to be the representative of the owner from that time; that the contract which the man in charge has shows that he is accompanying the stock, and that his name is written on the back of it as the man in charge; that he is entitled to free transportation home upon surrendering the contract at the end of the route; that one Fraser was selected to accompany the Philipsburg, Gold Creek, and Deer Lodge shipments; that his name was indorsed on the contracts, and that he accompanied them to Billings, Montana, but became ill there, and that some other person was substituted in his place; and that the name of such person was not indorsed on the contract. It is not clear from the evidence who employed him.

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The witness Rea had sold the lambs to the plaintiffs, and gave directions about their loading and billing. He stated: "I did say that when I got here [Billings] with the Gold Creek, Deer Lodge, and Philipsburg sheep, that Fraser got sick, and we picked up some one here in the yard. * * * I do not know where he is now. We gave him a letter to Mr. Erickson to get his transportation back. His name wasn't on the contract, but we gave him a note to Mr. Erickson to try to get a pass back because Fraser was sick. The fellow's name was Smith, as I recall. * * * When we put a man in charge of the sheep, he is supposed to be the representative of the owner from that time on. Of course, when we pick up a tramp along to go just to carry the count for the stockyard man, to count the sheep back in the car, I don't know whether you would call him an agent or not. We don't label him with a tag that he is a tramp and has no responsibility so that the agent would see and identify him along the road, but I suppose when we bill sheep that the billing is what counts. In other words, that they are going to be handled according to the billing and contract." The Erickson referred to was shown to have been the superintendent of the feeding yards of the Burlington Railroad Company at Montgomery.

At the close of all the evidence, the defendant moved the court to strike out that relating to oral instructions and directions regarding the shipping of the lambs made at the time of the execution of the contracts, and to withdraw from the consideration of the jury all evidence of damage arising out of the failure of the Burlington Railroad Company to stop the lambs at Montgomery in so far as it was claimed for failure to stop those shipped from Gold Creek, Deer Lodge, and Bozeman, on the ground that the evidence in this connection was wholly incompetent. Defendant also moved the court to withdraw from the consideration of the jury the question of damage to the shipment from Philipsburg, on the ground that the original contract for the shipment of these lambs was modified and changed by a written order signed by the man in

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charge of them who was in possession of the original contract or bill of lading at St. Paul, eliminating the notation directing the stopping of the lambs at Montgomery and also the notation on the waybills, thus modifying the contract and authorizing the Burlington Railroad Company to carry these lambs through to Chicago without stopping at Montgomery for rest and feeding. The defendant also moved the court to direct a verdict in its favor as to each of the shipments, on the ground that there was no competent evidence to sustain the allegations of the complaint in that it appeared that each of the shipments at the time the lambs were received by the Burlington Railroad was moving under contracts and waybills providing for a through transit to Chicago without stop at Montgomery, and also on the ground that there was no substantial evidence to show that the Burlington Railroad Company violated the provisions of these contracts, or either of them. The motions of defendant were sustained as to all the shipments except the one from Philipsburg. As to this, the motion was denied.

The plaintiffs then moved the court to strike out all evidence introduced by the defendant showing a change of the billing of the Philipsburg shipment from South St. Paul to Chicago, on the ground that it was incompetent. This motion was sustained. The cause was then submitted to the jury under an instruction to find the issues in favor of the plaintiffs as to this shipment, and directing the jury to determine the amount of damages, if any, that the plaintiffs sustained, not exceeding the sum of \$3,263.82, with interest from October 23, 1916. The jury found a verdict in favor of the plaintiffs in this amount.

We shall first dispose of plaintiffs' appeals. They assail the [1] integrity of the judgment so far as they were denied recovery for alleged damage to the Deer Lodge, Gold Creek, and Bozeman shipments, by the order of the court sustaining defendant's motion to strike out all the evidence to which it related. In this ruling, the court evidently proceeded upon the theory that the evidence was incompetent because the effect

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of it would have been to vary the terms of the contracts, by adding to each of them a stipulation for a stop at Montgomery. We think the ruling was correct. The published tariffs and regulations made a part of them enter into and form a part of the contract of shipment. The shipper and carrier are both bound to take notice of them, and, whether the shipper has actual knowledge of them or not, they are conclusive upon him, as well as the carrier, so long as they remain operative. (*Chicago, R. I. & P. Ry. Co. v. Cramer*, 232 U. S. 490, 58 L. Ed. 697, 34 Sup. Ct. Rep. 383; *Great Northern Ry. Co. v. O'Connor*, 232 U. S. 508, 58 L. Ed. 703, 34 Sup. Ct. Rep. 380; *Atchison, T. & S. F. R. R. Co. v. Robinson*, 233 U. S. 173, 58 L. Ed. 901, 34 Sup. Ct. Rep. 556; *Boston & M. R. R. Co. v. Hooker*, 233 U. S. 97, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593, 58 L. Ed. 868, 34 Sup. Ct. Rep. 526.) They make it the duty of the local agents of the defendant railway company to write the notations for stops desired upon the face of the contracts. Such notations become binding upon a carrier and its connecting lines when made, just as though they were incorporated in the contract as formal stipulations; and, being noted upon the waybills, become the binding directions to the conductor in charge, except so far as the railroad company is required by some state or federal law, or for some unforeseen accident, to stop at other points than those designated by the shipper. If the railroad or its connecting line then assumes to stop at any other point, it does so at its peril. It is only upon the theory that this is so that plaintiffs can justify the contention now made that defendant became liable for the failure of the Burlington Railroad Company to stop the lambs at Montgomery. Likewise the shipper is bound by the contract as executed by the carrier and as accepted by him. It states the terms and conditions upon which the shipment is accepted, and, being clear and explicit in its terms, these must control both parties for all the purposes and incidents of the shipment.

The negotiations between the parties and the directions, given [2] by the shipper preceding the execution of the contract and acceptance of it by him, are presumed to have been merged in the contract itself when it has assumed its final form, and evidence of terms other than those contained in it become wholly incompetent, unless a mistake or imperfection in it has been put in issue by the pleadings, or its validity has become the fact in dispute, or it has become necessary to explain an intrinsic ambiguity in the contract or to establish illegality or fraud. (Rev. Codes, secs. 7873, 5018; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873; *Ford v. Drake*, 46 Mont. 314, 127 Pac. 1019.) The rule is so familiar that further comment or citation of authority is unnecessary. Having accepted it, the shipper is presumed to have done so with the knowledge of its contents, and cannot thereafter assert ignorance of them as a reason why he should be allowed to resort to parol evidence of prior negotiations or agreement to vary or alter them. This is true of transportation contracts issued to passengers as well as of shipping contracts. (Rev. Codes, sec. 5340; *Michie on Carriers*, secs. 448, 449, 469; 10 C. J. 198; *Sanden v. Northern Pac. Ry. Co.*, 43 Mont. 209, 34 L. R. A. (n. s.) 711, 115 Pac. 408; *Brian v. Oregon, S. L. R. R. Co.*, 40 Mont. 109, 20 Ann. Cas. 311, 25 L. R. A. (n. s.) 459, 105 Pac. 489.) It may be [3] added that, while evidence of usage (custom), together with the circumstances under which a contract was made, may be admitted in proper cases to aid the court in ascertaining the true meaning of it and the intention of the parties in making it (Rev. Codes, secs. 7887, 7877), such evidence is never competent when the contract is clear and explicit in its terms and the necessity for interpretation does not arise. Under these circumstances the intention of the parties is to be ascertained from the writing itself without resort to evidence. (Rev. Codes, sec. 5028; *Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 69 Pac. 241; *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761; *Frank v. Butte etc. Co.*, 48 Mont. 83, 135 Pac. 904; *Brockway v. Blair*, 53 Mont. 531, 165 Pac. 455.) There is no

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controversy but that the contracts in question here are clear and explicit in their terms. This being so, resort could not be had to parol evidence to add to them any stipulation or term which they did not contain at the time they were accepted.

Counsel cite and rely with confidence on the case of *Parham v. Chicago, M. & St. P. Ry. Co.*, 57 Mont. 492, 189 Pac. 227, in support of their contention that the evidence stricken out was competent, under the allegations of the complaint, to show that it was the custom among shippers, known to the defendant, to stop lambs for feed and rest at some point near Chicago before sending them in to put them upon the market. A cursory examination of that case, however, will disclose that it has no application to the facts of this case. In that case evidence of custom was held competent because the contract under consideration was ambiguous and it was thus made necessary to construe it by reference to the circumstances in order to arrive at the true intention of the parties.

In support of its appeals, the defendant makes several assignments of error, but all of them in different ways present the same question, *i. e.*: Did the court commit error in striking out the evidence relating to the change in the billing of the Philipsburg shipment made by the agent of the Burlington Railroad Company at South St. Paul in compliance with the written instructions of Dauer? It is contended that there was no conflict in the evidence in this connection, and that, since it appears that Dauer, unquestionably the person in charge of the shipment, having possession of the contract, presented himself to the agent and gave him instructions in writing as required by the published tariffs, and that, since it is further shown by the evidence that it is a well-established custom among railroad carriers and in commercial circles to recognize the person producing the shipping contract as the one in control and direction in the handling of the freight, Dauer's directions were properly complied with by the agent, with the result that the original contract was modified, and that the plaintiffs were bound by it as so modified. It is true there is no conflict in the evidence as to what occurred between

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Dauer and the agent. Neither is there any conflict tending to show that plaintiffs had not given to Dauer any authority other than such as was implied by the fact that he was in charge of the shipment as an attendant. How he came to be acting in this capacity is disclosed by the testimony of the witness Rea, in so far as there is any evidence on the subject at all. If it be assumed that he was the man substituted for Fraser at Billings, the attendant originally put in charge, in the absence of any specific statement by any witness in this connection, we must assume this to be the fact—he had no other or greater authority than had Fraser. Now, we apprehend that if Fraser had continued in charge it could not be insisted that he had any actual or ostensible authority to direct the agent to change the original contract in any particular. By its clear and express terms he would have possessed only the authority of an attendant, and his identification of himself by presentation of it to the agent would not have created any presumption that he had any other authority upon which the agent could legally have acted. Under the rules of the defendant railway company it was the duty of the local agent at the point of shipment to enter the name of the attendant on the back of the contract, and to require him to affix his signature for the purpose of identification as the one entitled to free transportation going and returning. In order to get free transportation, he was required to surrender the contract at the point to which the shipment was consigned. If, under the circumstances, he had been in charge at South St. Paul, the agent would have been presumed to know the extent of his authority. In any event, the agent would have been required to have him identify himself by his signature, the only means available, and by this method of identification the agent, having the contract before him, would have known exactly the extent of Fraser's authority. He would have been permitted, under the circumstances, to infer nothing else than that Fraser was simply an attendant with such authority as was defined in the contract. He would not have been justified, therefore, in modifying the contract at Fraser's direction. Now, as we have

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stated, there is no evidence showing that Dauer had been given any authority other than that which Fraser had under the contract. The burden was upon the defendant to show that he had ostensible authority to do what he did. There was no method recognized by the contract or the dealings between the plaintiffs and defendant by which he could identify himself. His own statement that he was the person in charge was the only evidence submitted to the agent. In our opinion, this was not such an identification as is required by the published tariffs. They provide that: "The points at which animals are to be stopped * * * cannot be changed except upon written instruction of the owner or his authorized agent, the question of ownership or agency to be determined by proper identification."

In our opinion, the mere possession of the bill of lading under the circumstances was not a sufficient identification, and if the agent assumed to act upon the directions of Dauer, he acted at his own risk. From this point of view the ruling of the court was correct.

We have not been favored by a brief by the plaintiffs in this connection, nor have we been cited by the defendant to any authority directly in point. On principle, we think the foregoing conclusion the only one which is legitimate upon the evidence before us. Counsel have referred us to the case of *Parham v. Chicago, M. & St. P. Ry. Co.*, *supra*, but we do not think it in point because the evidence introduced by the defendant in this case was not sufficient to require the question of the ostensible authority of Dauer to be submitted to the jury.

We find no error in the record. The judgment in favor of plaintiffs is affirmed, as also are the orders denying plaintiffs' and defendant's respective motions for a new trial.

Affirmed.

ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur.

MR. JUSTICE REYNOLDS, being disqualified, takes no part in the foregoing decision.

**FONTAINE, RESPONDENT, v. LYNNG, EXECUTRIX, ET AL,
APPELLANTS.**

(No. 4,532.)

(Submitted November 4, 1921. Decided December 19, 1921.)

[202 Pac. 1112.]

***Real Property—Vendor and Purchaser—Contracts—Fraud—
Rescission—Waiver—Forfeitures—Equity.***

Real Property—Contract of Sale—Material Misrepresentation—Rescission.

1. A misrepresentation made by the owner of a ranch to its purchaser that a barn, and a spring in close proximity thereto, inclosed with a fence were a part of the property sold, was material, and sufficient ground for rescission.

Same—Rescission—When Right not Waived.

2. Where the purchaser of ranch property waited nearly a year for the vendor to make good his promise that he would buy the land upon which a barn and spring were located and which he had falsely represented as being included in the property sold, the former's acts in asking for an extension of time for payment of an installment of the purchase price due and cropping the land in the meantime did not constitute a waiver of his right to rescind.

Same—Rescission—When Waived.

3. By continuing in possession of ranch property for more than five months after commencement of suit to rescind, the vendee waived his right of rescission under section 5065, Revised Codes, making it incumbent upon a party desiring to rescind to tender back possession and to keep the tender good by removal from the premises.

Same—Breach of Contract—Forfeiture of Part Payments—When Relief Proper.

4. Notwithstanding the provision in a contract of sale of ranch land that on default of deferred payments all prior payments should be deemed forfeited as rental, the party in default may obtain relief from forfeiture if not guilty of grossly negligent, willful or fraudulent breach of duty, on presentation of such grounds therefor as appeal to the conscience of a court of equity.

Same—Relief from Forfeiture of Part Payments—When Proper.

5. *Held*, under the above rule (paragraph 4), that where a purchaser of ranch lands had paid \$10,000 of the purchase price when he sought to rescind under circumstances showing waiver of his right to rescind, and defendants in their counterclaim asked for cancellation of the contract on account of its breach, and forfeiture of the amount paid, he was entitled to be relieved of forfeiture of the amount paid over and above full compensation for the use of the property, if not guilty of gross negligence or willful or fraudulent breach of duty.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

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ACTION by C. H. Fontaine against Jennie Lyng, as executrix of the last will and testament and estate of Halvor O. Lyng, deceased, and others. Decree for plaintiff, and defendants appeal. Reversed and remanded.

Mr. I. W. Church and *Mr. Fletcher Maddox*, for Appellants, submitted a brief; *Mr. Maddox* argued the cause orally.

The alleged misrepresentations in respect to the location of the barn and its proximity to water are not made the basis of any claim for damages. It is not shown that the plaintiff was damaged or injured either in money, or his position altered to his prejudice by any misrepresentations; hence he cannot rescind because of them. He was not disturbed in his possession. The notices to remove the barn were entirely a matter for the defendants to deal with. The barn question would hardly seem debatable, since the mere anticipated inability to convey the strip on which the barn stood would not be ground for rescission. (6 R. C. L., p. 929; *Maloney v. Houston* (Cal. App.), 197 Pac. 661; *Armstrong v. Sacramento Valley Realty* (Cal. App.), 198 Pac. 217.)

Plaintiff lost his right to rescind by laches and through waiver by acquiescence. Assuming for the purpose of this argument that plaintiff was entitled to rescind, we contend that he lost that right by laches in offering to restore. Plaintiff was not entitled to maintain this action in equity until he had first restored or offered to restore the property. He did not offer to restore until after amending his complaint to make the offer. There was no offer to restore at the time of filing the complaint. He did not actually restore until many months after. (6 R. C. L., sec. 321, p. 940; *Como Orchard Land Co. v. Markham*, 54 Mont. 438, 171 Pac. 274; *Suburban Homes Co. v. North*, 50 Mont. 108, 114, Ann. Cas. 1917C, 81, 145 Pac. 2; *Putney v. Schmidt*, 16 N. M. 400, 120 Pac. 720.)

Again, plaintiff has lost his right to rescind by laches in making any claim of fraud. Plaintiff himself admits that he discovered the fraud in May, 1917, but the jury found that

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he first had knowledge of the fraud in December, 1916. Thus he delayed eleven months in making any claim of fraud. In the meantime he worked the ranch and appropriated the crops to his own use, realizing about four thousand dollars. This alone defeats rescission. (*Ott v. Pace*, 43 Mont. 82, 115 Pac. 37; *Turk v. Rudman*, 42 Mont. 1, 111 Pac. 739.) Plaintiff lost his right to rescind by waiver through acquiescence. One who has notice of having been defrauded is bound to ascertain the full extent of the fraud. Notice is brought home to him that a man who has been false in one thing may have been false in all, and it becomes incumbent on him to make a full investigation. (*Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304; *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732; *Bancroft v. Woodward*, 183 Cal. 99, 190 Pac. 445.) A vendee continuing in use of the property after knowledge of the fraud or being put upon notice waives the right to rescind. (*James v. Ward*, 96 Or. 667, 190 Pac. 1105; 3 Elliott on Contracts, sec. 2430; *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Kingman & Co. v. Stoddard*, 85 Fed. 740, 29 C. C. A. 413; *Temple Nat. Bank v. Warner* (Tex.), 31 S. W. 239; *Thiemann v. Heinze*, 120 Mo. 630, 25 S. W. 533.) Again, plaintiff entered into a new agreement in respect to the barn after having been notified that its location was in dispute, and further, in August, asked for an extension of the payment to become due in November. Either of these acts defeats his right to rescind. (6 R. C. L., p. 932; *Burne v. Lee*, 156 Cal. 221, 104 Pac. 438; *Schmidt v. Mesmer*, 116 Cal. 267, 48 Pac. 54; *Tarkington v. Purvis*, 128 Ind. 182, 9 L. R. A. 607, 25 N. E. 879.) Asking for an extension of the principal due November 2 was a distinct act of waiver. The effect of a request for an extension without repudiating the sale is equivalent to making a payment after knowledge of the fraud. (*Parsons v. McKinley*, 56 Minn. 464, 57 N. W. 1134; *Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913; *Howle v. North Birming-*

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ham Land Co., 95 Ala. 389, 11 South. 15; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785.)

It may be generally stated that any act done by the complaining party after discovering the fraud toward carrying out the contract constitutes an irrevocable election to abide by the contract. (6 R. C. L., sec. 317, p. 933; 3 Elliott on Contracts, sec. 2430; *Loan Trust Co. v. McIntosh*, 68 Kan. 452, 1 Ann. Cas. 906, 75 Pac. 498; *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712, 17 Atl. 93.)

The defendants were entitled to a decree canceling the contract and forfeiting the payments as rental. Time was of the essence of the contract. The plaintiff had defaulted in his November payment. Defendants were entitled to declare the payments forfeited and demand a surrender of the premises. Under the decree as rendered the plaintiff recovers his initial payments of \$10,000 with interest; damages in the sum of \$915.90 and receipts from the ranch approximating \$4,000. He pays nothing for the use of the ranch for practically eighteen months. The manifest injustice of such a decree requires no further comment.

Mr. W. S. Towner and *Messrs. Norris, Hurd & Rhoades*, for Respondent, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. JUSTICE REYNOLDS delivered the opinion of the court.

Upon the second day of November, 1916, the plaintiff entered into a contract with Halvor O. Lyng and Jennie Lyng, his wife, for the purchase of certain real estate. About a year afterward, plaintiff commenced this action against Jennie Lyng, as executrix of the last will and testament of Halvor O. Lyng, deceased; Hilman Lyng, Clara Lyng, and Jennie M. Kitt, devisees under the will, claiming a rescission of the contract on the ground of misrepresentations. Defendants with their answers filed a counterclaim claiming a cancellation of the contract be-

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cause of the failure of plaintiff to make payments in accordance with the terms thereof. The case was tried before the court sitting with a jury. Findings of fact were made by the jury substantially sustaining plaintiff's contentions, which were adopted by the court with additional findings. The court made conclusions of law and entered decree in favor of plaintiff in accordance therewith. Defendants have appealed from the decree.

In the latter part of October, 1916, plaintiff and his wife came [1] from the state of Washington, looking for an investment in land. Hilman Lyng, son of Halvor O. Lyng, now deceased, as his father's agent undertook to sell to plaintiff his father's ranch consisting of approximately 2,360 acres of land, and showed him the premises. In addition to certain other alleged misrepresentations which are not necessary to be considered, Hilman Lyng pointed out the barn and a spring of water in close proximity to it, inclosed with the Lyng land within a certain fence, and represented that the fence was the south boundary line of the ranch; however, the barn and the spring were not within the boundary line of the Lyng ranch but south of it, the barn being from thirty to forty feet south of the south line of the ranch and the fence about 100 feet south of the line. This was a matter of considerable importance to plaintiff in his handling of livestock as he contemplated. Plaintiff took possession November 17, 1916, having paid \$10,000 upon the purchase price, \$2,000 of which was paid on the execution of the contract and \$8,000 on the date of taking possession. In December following, a verbal notice was given to plaintiff by one Sample claiming that the barn was upon his premises, and directing plaintiff to remove it therefrom, which was the first intimation that plaintiff had that the barn and spring were not within the boundaries of the ranch. Plaintiff immediately took up the matter with Hilman Lyng, who assured plaintiff that it would be all right; that there was an agreement between his father whereby his father was to purchase the land inclosed with the fence belonging to Sample or would move the barn

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on to the Lyng land. Plaintiff said nothing, neither expressing satisfaction with nor dissent from the proposition and did nothing further about it at that time. About April, 1917, Sample served a written notice on plaintiff again demanding the removal of the barn. The matter was again taken up by plaintiff with Hilman Lyng, who gave him the same assurances as before. So far as appears from the record, nothing further was done in adjusting the matter with Sample. Plaintiff cropped the place for 1917, and in September, 1917, he went to the executrix and asked for an extension of time upon the payment due November 2 of that year, which extension was not granted. On the 20th of October, 1917, plaintiff presented to the executrix his claim for rescission and damages, which claim was disallowed. On the 1st of November, 1917, this action was commenced. On December 18, 1917, Hilman Lyng served upon plaintiff written notice canceling the contract because of the failure of plaintiff to make the payment due November 2 preceding, and demanding possession of the ranch. Plaintiff, however, remained in possession of the ranch until about the middle of April, 1918.

The first question to be determined upon this appeal is whether or not plaintiff is entitled to a decree rescinding the contract. The evidence of the plaintiff's witnesses was clear and unequivocal that Hilman Lyng misrepresented the south boundary of the ranch so as to include the barn and spring, and the findings of the jury and of the court were in accordance therewith. This feature of the case being determined by the jury and the court in favor of plaintiff upon sufficient evidence, and the representation being material, it must be held that such misrepresentation was sufficient ground for rescission. (*Post v. Liberty*, 45 Mont. 1, 121 Pac. 475.)

The court expressly found that plaintiff "trusted to Hilman [2] Lyng and associate owners of the Lyng ranch to take such action as was necessary to include said barn and water within the boundaries of the said Halvor O. Lyng home ranch," and the finding was unquestionably supported by the evidence.

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Plaintiff had the right to rely upon the assurances of Hilman Lyng and, in doing so, was justified in giving to Hilman Lyng a reasonable time within which to fulfill his assurances. While resting upon these promises, plaintiff had the right to continue with his contract, and therefore, whatever he did in the way of cropping the land, of seeking an extension of time for payment of the installment due November 2, 1917, would not be any waiver of his right to rescind on the ground of the misrepresentations as to the barn and water if such assurances should not be fulfilled. On the contrary, plaintiff was not under obligation to wait indefinitely for this matter to be adjusted, and when, after nearly a year's time, nothing had been done to make good the defect in the title, plaintiff had the right to declare the rescission of the contract.

Plaintiff, however, after filing his claim with the executrix, [3] and after commencement of suit, failed to stand upon his right of rescission, but waived such right by remaining in possession of the premises for a period of over five months thereafter and until about the middle of April, 1918. Under the statute, in order to rescind the contract, the one seeking to rescind must return to the other party, with reasonable diligence, all that he has received under the contract, or offer so to do. (Rev. Codes, sec. 5065.) In this case all that plaintiff received under the contract was the possession of the premises. Therefore it devolved upon him, upon rescinding the contract, to forthwith tender back the possession and keep the tender good. He could keep the tender good only by removal from the premises so that there would be nothing whatever in the way of the vendor resuming possession. (*Smith v. Christie*, 60 Mont. 604, 201 Pac. 1011.) In this case, plaintiff not only failed to surrender the premises upon the commencement of the suit, but he remained in the possession of the premises for months after defendants had demanded possession from him. Under these circumstances we cannot escape the conclusion that plaintiff waived his right of rescission.

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On the 18th of December, 1917, defendants served notice [4-5] upon plaintiff of cancellation of the contract by reason of the nonpayment of the installment of principal and interest which became due November 2, 1917, as hereinbefore stated. Defendants now insist, as set forth in their counterclaim, that the contract has been canceled, and, the contract having been recorded, they pray for a decree determining that the contract is canceled and removing the cloud from the title, and also that the payments made upon the contract shall be declared forfeited. The contract provides that upon default the escrow deed shall be returned to vendor, "and that all payments theretofore made by said party of the second part shall be considered as rental for said lands and premises and shall be forfeited by said party of the second part to said party of the first part."

The reply of plaintiff admits the failure to make the payments, but alleges that such payments were not made for the sole reason that Hilman Lyng had made the misrepresentations hereinbefore referred to, and alleges that if the representations had been true, the plaintiff would have paid on November 2, 1917, the amount due on the contract at that time, and that by reason of the foregoing facts it would not be just or equitable to permit the defendant to retain the payments that were made. Under the facts in the case, defendants were entitled to cancel the contract because payment was not made in accordance with its terms, and, being entitled to cancellation of the contract, they are therefore entitled to a decree determining that the contract is canceled and removing the cloud from their title. If there had been no prayer for forfeiture of the payments, the decree canceling the contract and removing the cloud from the title could be entered and the case would then be disposed of; but defendants having prayed for a decree declaring a forfeiture of the payments, it now becomes necessary for us to determine whether or not they are entitled to retain the whole of such payments.

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It is provided by the statute that "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful or fraudulent breach of duty." (Rev. Codes, sec. 6039.) While the contract provides that the moneys so paid on the contract shall be forfeited and held as rental, yet it is clear upon the face of the contract that the \$10,000 paid would be considerably in excess of any reasonable rental value of the premises for the time that they were occupied by plaintiff. While the retention of the moneys is based upon the theory of rental, yet it is clear that the relation of landlord and tenant did not exist, nor was it within the contemplation of the parties that such relation should continue after the default, because no such terms were stated. The occupancy of the premises by plaintiff was by virtue of the contract and as purchaser thereunder and not as a tenant. Under these circumstances, the clause of the contract providing that the vendor should retain the moneys paid as rental involved a loss to plaintiff in the nature of a forfeiture by reason of his failure to comply with the provisions of the contract. Under the statute, plaintiff is entitled to be relieved from this forfeiture upon making compensation to the defendants unless he was guilty of grossly negligent, willful or fraudulent breach of duty. In order for plaintiff to be entitled to this relief, he must present such grounds therefor as will appeal to the conscience of a court of equity. (*Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700; *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694; *Clifton v. Willson*, 47 Mont. 305, 132 Pac. 424; *Suburban Homes Co. v. North*, 50 Mont. 108, Ann. Cas. 1917C, 81, 145 Pac. 2.)

It seems to us that the facts in this case come within this rule. Plaintiff was entitled to rescind by reason of the false representations as to the boundaries of the ranch as hereinbefore pointed out, and in October, 1917, filed claim with the

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executrix of the estate of Halvor O. Lyng, deceased, in effect claiming such rescission, and thereafter commenced action in the court to secure a decree for rescission. While plaintiff later waived his right of rescission by retaining the possession of the premises and exercising acts of proprietorship over them, nevertheless he was insisting upon rescission. While in this position, it could not be expected that he would continue to make payments on the contract, thus destroying the effect of his rescission. Under these circumstances, it cannot be said that his failure to perform the contract in not making the payment due November 2, 1917, was due to gross negligence or willful or fraudulent breach of duty. If, then, the actual damages sustained by defendants are less in amount than the moneys paid by the plaintiff upon his contract, plaintiff is entitled to reimbursement to the extent of the excess payments. (*Cook-Reynolds Co. v. Chipman, supra.*) Inasmuch as the evidence fails to show the value of the use and occupation of the premises by plaintiff for the time that he was in possession thereof, which, in the absence of any showing to the contrary, we assume constitutes the defendants' damage, it becomes necessary that the case be remanded for further proceedings to determine the credit to which defendants are entitled in the adjustment of the equities between the parties.

For the reasons herein given, it is ordered that the judgment be reversed and the cause remanded to the district court, with directions to determine what allowance should be made to defendants for the use of the property in question for the time that the premises were occupied by plaintiff, and that thereupon judgment be entered canceling the contract, removing the cloud of the contract from the title, awarding possession of the property to defendants, and providing that plaintiff do have and recover from defendants the sum of \$2,000 with legal interest thereon from and after November 2, 1916, and for the sum of \$8,000, with legal interest thereon from and after November 17, 1916, less the value of the use and occupation of the premises, to be ascertained as above mentioned, with inter-

est thereon at the legal rate from and after the date of plaintiff's removal therefrom.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES COOPER, HOLLOWAY and GALEN concur in the result.

STATE EX REL. JUDITH BASIN COUNTY, APPELLANT, v.
POLAND ET AL., RESPONDENTS.

(No. 4,898.)

(Submitted November 4, 1921. Decided December 19, 1921.)

[203 Pac. 352.]

*New Counties—Adjustment of Indebtedness—Constitution—
“County Property”—Incomplete Bridges—Record Books—
Mandamus.*

Constitution—Words and Phrases—Interpretation.

1. In ascertaining the meaning of words used in the Constitution, they will be presumed to have been used in the sense in which they were used generally at the time the Constitution was adopted, and interpreted in the light of the statutes then existing and continued in force by schedule 1 of that instrument.

New Counties—“County Property”—Adjustment of Indebtedness.

2. “Property of the county” within the meaning of section 3, Article XVI, Constitution, under which, when a new county is created, the net indebtedness of the old county, its ratable proportion of which the new one must pay, is to be determined by deducting from its total indebtedness the value of all property of the old county, *held* to mean such property as a county holds and can sell.

Constitution—Legislative Construction—How to be Viewed.

3. While legislative construction of a term used in the Constitution is not binding upon the courts, it is entitled to most respectful consideration.

New Counties—Bridges—Property of State.

4. A completed bridge used by the public is a part of the public highway and belongs to the state, and is therefore not county property such as may be considered in adjusting the indebtedness between an old and a new county.

2. New counties and their relation to old counties, see note in 20 Am. St. Rep. 676.

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Counties—Construction and Maintenance of Bridges.

5. While the obligation to build and maintain highways, including bridges, primarily devolves upon the state, it may impose, and in Montana has imposed, that duty upon the counties and municipalities.

New Counties—Incomplete Bridges not County Property—Adjustment of Indebtedness.

6. *Held*, that a partly finished bridge constructed with funds obtained by a bond issue is not such county property as it may sell, and therefore cannot be taken into consideration as county property (paragraph 2) in the adjustment of indebtedness between an old and a new county.

Mandamus—Lies When.

7. The writ of mandate lies only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station, and therefore will not issue to do a thing beyond the power or duty of the person sought to be compelled.

New Counties—Indebtedness—Adjustment—Mandamus—When not Proper Remedy.

8. *Held*, that where the board of commissioners of a county a portion of which was thereafter included in a new county, in order to obtain favorable action by the electors of that portion on a proposed issue of road bonds, passed a resolution, amounting to a promise merely, that in the event the bonds were authorized, a certain proportion of the receipts would be devoted to road improvement in their district, their breach of trust in thereafter failing to carry out their promise could not be remedied by writ of mandate to compel the board of adjusters of the indebtedness between the old and the new county to charge the old county with the amount the district should have received under the resolution, the New Counties Act (Laws 1919, Chap. 226) not authorizing the adjusters to take such action.

Same—County Records—Not County Property to Enter into Adjustment of Indebtedness.

9. Public record books of a county are not county property to be taken into consideration by a board of adjustment of county indebtedness between an old and a new county.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

MANDAMUS on the relation of Judith Basin County against R. G. Poland and others, Commissioners. From an adverse judgment, relator appeals. Affirmed.

Mr. John B. Muzzy and Messrs. Pray & Callaway, for Appellant, submitted a brief; *Mr. Lew L. Callaway* argued the cause orally.

Mr. H. G. Bennett, Mr. Edgar J. Baker, Mr. Wm. M. Blackstone and Messrs. Norris, Hurd & Rhoades, for Respondents,

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submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On September 2, 1920, Judith Basin county was created from a portion of Cascade county and from a portion of Fergus county. Pursuant to statute, the governor appointed these respondents members of a board to adjust the indebtedness between the counties, and, the board having completed its labors, made its report and adjourned; this proceeding was instituted on behalf of Judith Basin county to secure a writ of mandate to compel the board to reassemble and correct certain errors which it is alleged had been committed. The trial court sustained a demurrer and motion to quash, and rendered and had entered a judgment dismissing the proceeding. The relator appealed.

Section 3, Article XVI, of our Constitution provides that, when a new county is created, it shall be held to pay its ratable proportion of the then net indebtedness of the old county, the net indebtedness to be determined by deducting from the total indebtedness the value of all property of the old county.

Primarily the question presented is this: What is meant by [1, 2] the terms "property of the county" or "county property" as employed in the Constitution above? These general rules are applicable: (1) The presumption will be indulged that the terms were employed in the sense in which they were used generally at the time the Constitution was adopted (*State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162); and (2) the terms will be understood in the light of existing statutes continued in force by schedule 1 of the Constitution (*State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392). Upon the creation of Montana territory, the first legislative assembly passed an Act which provided: "That each organized county within this territory, shall be a body corporate and politic; and as such, shall be empowered for the following purposes: First,

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to sue and be sued. Second, to purchase and hold real and personal estate for the use of the county, and lands sold for taxes, as provided by law. Third, to sell and convey any real or personal estate owned by the county," etc. (Bannack Statutes, p. 498.) That statute continued in force from 1864 until 1895 (Cod. Stats. 1871, p. 433; Comp. Stats. 1887, p. 842), and must be held to have been in contemplation at the time the Constitution was adopted in 1889. As understood at that time, "county property" was such property as a county held and could sell, but no one would contend that a county could have sold all or any part of a public highway lying within its boundaries, and the reason it could not do so is that a public highway is not owned by the county, though it may be compelled to keep it in repair. In other words, the territorial legislature and the constitutional convention made clear the distinction between property held by a county in its proprietary capacity and property subject to its jurisdiction as a governmental agency—a distinction recognized by all of the authorities. In 1895 a statute was enacted in substantially the same terms as the Bannack statute above (Pol. Code, sec. 4230, subd. 10), and that statute has been carried forward and is in effect at the present time (sec. 2894, subd. 10, Rev. Codes). As the Bannack statute indicated the meaning of the terms "county property" at the time the Constitution was adopted, so the Act of 1895 indicates the legislative understanding of the meaning of the terms as employed by the framers of the [3] Constitution, and, while a legislative construction is not binding upon the courts, it is entitled to most respectful consideration. (*Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386), and in this instance we adopt it, since it meets our views. From the creation of the territory to the present day every county has had express authority to sell any property belonging to it, or, in other words, the power to sell has at all times been a controlling consideration in determining whether particular property is county property.

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With the preliminary question settled we proceed to an [4-6] application of the definition of "county property" to the facts of this case. By a vote of the qualified electors, Cascade county was authorized to issue bonds to the amount of \$408,000, the money derived therefrom to be expended in erecting two bridges over the Missouri River at Great Falls—one at First Avenue North and the other at Tenth Street North. At the time Judith Basin county was created, \$98,000 in round numbers had been expended upon the First Avenue bridge and \$150,000 upon the Tenth Street bridge, but neither bridge was complete or capable of being used by the public. In adjusting the indebtedness between Judith Basin county and Cascade county, the board refused to treat these unfinished bridges as county property. It is conceded, as it must be, that a complete bridge used by the public is a part of the public highway (*State ex rel. Donlan v. Board*, 49 Mont. 517, 143 Pac. 984), and, speaking generally, is not county property, and cannot be considered in adjusting the indebtedness between the old county and the new one (*State ex rel. Foster v. Ritch*, 49 Mont. 155, 140 Pac. 731). We are not intimating an opinion as to the validity of section 7, Chapter 226, Laws of 1919, as it is not involved in this proceeding. It is the contention of the appellant that neither of these incomplete structures is a bridge in the sense that it provides a passageway over the Missouri River, and therefore the public right has not attached, and the two structures should have been considered the property of Cascade county of the value of \$248,000, and that amount deducted from the county's indebtedness. It is beyond controversy that these incomplete bridges constitute property, but whether they constitute county property within the meaning of the Constitution (Art. XVI, sec. 3, above) is not to be determined by reference to the popular definition of the term "bridge," but by reference to the character of the property itself, and the property takes character from the character of the fund out of which payment is made and from the relation which the county sustains to the fund and the prop-

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erty acquired by its expenditure. Primarily the obligation to build and maintain public highways, including bridges, devolves upon the state, but, in the absence of constitutional restrictions, the state may either discharge the trust directly or impose the duty upon one or more of its agencies (*Yocom v. City of Sheridan*, 68 Or. 232, 137 Pac. 222), and in this state the duty is imposed upon the counties and municipalities. The money derived from the sale of the bonds constituted a trust fund which could not be used for any purpose other than the construction of the two bridges (Const., Art. XIII, sec. 3), and, when completed, the bridges belong to the state, and not to Cascade county (9 C. J. 464). Whenever property is acquired by the state through the expenditure of funds impressed with a trust for that purpose only, even though the funds are raised by the county, the county acts in its governmental capacity as a trustee for the public and the agency through which the state acquires the property. In their incomplete state these structures merely represent so much of the trust fund as had been expended upon them, and the county could no more divert the incomplete structures from the purpose to which the funds are dedicated than it could divert the funds themselves. It could not sell or otherwise dispose of these structures, but can be compelled, as trustee for the public, to complete them and realize the purpose for which the funds were appropriated by the vote of the people. They are not county property, because the county has not that absolute control and disposition of them essential to ownership as understood at the time the Constitution was adopted. Expressions in conflict with these views will be found in *State ex rel. Furnish v. Mullendore*, 53 Mont. 109, 161 Pac. 949, but the most casual reading of the opinion will disclose that those expressions are *obiter dicta*, and upon further consideration we are satisfied they are erroneous.

In 1919 the electors of Fergus county were called upon to [7, 8] authorize the issuance of bonds to obtain money for the improvement of the public highways. The creation of Judith Basin county was then being agitated, and the electors of that

portion of Fergus county, afterwards incorporated in Judith Basin county, were opposed to the bond issue upon the theory that, if the new county was created, it would be held to pay its proportion of the indebtedness and might not receive any benefit. To allay this opposition, the commissioners of Fergus county adopted a resolution to the effect that, if the bonds were authorized, the money received from the sale of them should be apportioned among the several road districts according to the assessed valuation of the property therein. The bonds were authorized, and \$350,000 worth sold prior to the creation of Judith Basin county, and most of the money expended upon the highways in Fergus county, excluding the territory embraced in Judith Basin county. If the money had been apportioned according to the terms of the resolution before the creation of Judith Basin county, the road districts which were incorporated in the new county would have been entitled to receive \$106,000, and it is the contention of appellant that Fergus county should be charged with that amount as an offset *pro tanto* against the amount of Fergus county's indebtedness to be assumed by Judith Basin county. At the time the resolution was adopted by the Fergus county board, the fund was not in existence. It had not even a potential existence. Whether it would ever be created depended upon the will of the qualified voters. In no sense, then, can it be said that the resolution constituted an appropriation of the fund. At most, it amounted to a promise of good faith and fair dealing in the expenditure of the fund if it should be created, but the promise, however solemnly made, did not constitute an appropriation of the fund, and the failure of the board to carry the resolution into effect after the fund came into existence amounted, at most, to a breach of trust. But these respondents, as a board of adjustment, were without authority to compel Fergus county to carry into effect its declared purpose. The writ of mandate will issue only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. (Sec. 7214, Rev. Codes.) It will not

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issue to compel the performance of an act which would be useless, ineffectual or unavailing as a remedy or beyond the power or duty of respondents to perform it. (*State ex rel. Beach v. District Court*, 29 Mont. 265, 74 Pac. 498.) The board of adjustment is a specially constituted tribunal possessing only such powers as are expressly conferred by law or necessarily implied from those expressed, and nowhere in the statute (Chap. 226, Laws 1919) can such authority be found as is now sought to be imposed upon these respondents. If, by the adoption of the resolution, any obligation was created, it can be enforced only in the courts.

Complaint is made that the board of adjustment refused to [9] consider as county property the public record books kept by the officers of Cascade county and Fergus county, respectively. Although it must be conceded that these books constitute property, they are not county property within the meaning of the terms as employed in the Constitution. They are required to be kept, but for the use of the public generally. They are not subject to sale or other disposition and have no marketable value. This is in effect the decision in *Park County v. Big Horn County*, 25 Wyo. 172, 166 Pac. 674. A contrary conclusion was reached in *State ex rel. Mountrail County v. Amundson*, 23 N. D. 238, 135 N. W. 1117, but under a Constitution and statute so different from ours that the case is not authority here.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, COOPER and GALEN concur.

KILEY, ADMINISTRATRIX, RESPONDENT, v. DANAHEY, APPELLANT.

(No. 4,511.)

(Submitted October 31, 1921. Decided December 19, 1921.)

[202 Pac. 1110.]

Deeds—Cancellation—Want of Capacity in Grantor—Complaint—Inconsistent Findings—Appeal and Error—When Complaint Deemed Amended.

Deeds — Cancellation — Want of Capacity in Grantor — Complaint — Sufficiency.

1. In an action by an administratrix to set aside a deed on the ground that when her intestate executed it she was without understanding sufficient to make a valid contract, complaint examined and *held* sufficient to permit of proof from which the inference could properly be drawn that the grantor in putting her cross to and delivering the deed acted in obedience to the overpowering will of the grantee.

Same—Cancellation—Rescission—Complaint.

2. Plaintiff having based her action on the ground that at the time the deceased grantor executed the deed sought to be set aside she did not have capacity to make a contract under section 3595, Revised Codes and not on the ground that she was entitled to rescind under section 3596, an allegation that she had restored or offered to restore everything of value deceased had received from defendant was not required.

Appeal and Error—When Complaint Deemed Amended.

3. Where the sufficiency of the complaint was not tested by demurrer or objection to the admission of evidence under it during the trial, it will, on appeal, be deemed amended to admit the evidence necessary to support the judgment.

Deeds — Cancellation — Want of Capacity in Grantor — Inadequate Consideration—Findings.

4. Admissions of defendant, who claimed that the deed sought to be set aside on the ground of want of capacity in the grantor to make it had been made in consideration of a contract for the care and keep of the grantor until her death, showing brutal treatment of the grantor by defendant, an attempt on her part to have her placed in the poor farm, etc., warranted a finding of an intention on the part of the defendant to obtain the property upon a grossly inadequate consideration, as well as of lack of good faith on her part in the transaction.

Inconsistent Findings—Rule.

5. Findings complained of as fatally inconsistent are not so unless they are so inconsistent as to require the rendition of a different judgment upon any one or more of them or they have the effect of destroying each other.

Appeals from District Court, Silver Bow County; Edwin M. Lamb, Judge.

[61 Mont. 608.]

ACTION by Kate Kiley, administratrix of the estate of Catherine Sullivan against Kate Danahey. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Mr. W. D. Kyle, for Appellant, submitted a brief and argued the cause orally.

The complaint in this action is seen to be fatally defective in its failure to show either that Catherine Sullivan was entirely without understanding when she executed and delivered the deed to the defendant, or, if not then entirely without understanding but of unsound mind, a restoration to the defendant of everything of value received from her or an offer to do so. And it is not helped any by its allegations to the effect that the defendant obtained the deed through fraud, as sections 5063 and 5065 of the Revised Codes expressly require even in cases of fraud a compliance with their provisions before relief by rescission is accorded. (See *More v. Calkins*, 85 Cal. 177, 24 Pac. 729; *Castro v. Geil*, 110 Cal. 292, 52 Am. St. Rep. 84, 42 Pac. 804; *Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247; *Green v. Hulse*, 57 Colo. 238, 142 Pac. 416; *Ripperdan v. Weldy*, 149 Cal. 673, 87 Pac. 276, 279; *San Francisco Clearing House v. MacDonald*, 18 Cal. App. 212, 122 Pac. 964, 966; *Cotter v. Butte etc. Co.*, 31 Mont. 129, 134, 77 Pac. 509; *Duroderigo v. Culwell*, 52 Okl. 6, 152 Pac. 605.)

Nor does the allegation in the complaint "that there was no consideration for said deed" entitle the plaintiff to circumvent the statute relative to rescission, when it is considered that the law forbids destroying the legal effect of a written instrument by parol proof. (*Arnold v. Arnold*, 137 Cal. 291, 70 Pac. 23, 24; *Palmer v. Continental Ins. Co.*, 6 Cal. Unrep. 455, 61 Pac. 784; 3 Ency. of Evidence, 394, 395; *Riddell v. Peck W. etc. Co.*, 27 Mont. 44, 58, 69 Pac. 241.) The deed in suit recites a consideration, and the law presumes it was given for a consideration. (Rev. Codes, sec. 5010.)

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A judgment in this case that the deed is void would be in absolute disregard of certain of the court's findings and conclusions, which in legal effect show it to be voidable, and the same is true of a judgment that the deed is voidable. Hence, the judgments called for by these findings and conclusions would destroy each other. The test as to whether the judgment as rendered should be allowed to stand is whether the findings are so inconsistent that each requires the rendition of a different judgment, and thus mutually destroy each other. (*In re Murphy's Estate*, 43 Mont. 353, 362, Ann. Cas. 1912C, 380, 116 Pac. 1004; *Learned v. Castle*, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; *Maionchi v. Nicholini*, 1 Cal. App. 690, 82 Pac. 1052; *Birney v. Warren*, 28 Mont. 64, 72 Pac. 293; *Johnson v. Bielenberg*, 14 Mont. 506, 37 Pac. 12; *Authors v. Bryant*, 22 Nev. 242, 38 Pac. 439; *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; 38 Cyc. 1986.)

No appearance in behalf of Respondent.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was brought by the administratrix of Catherine Sullivan to set aside a deed executed and delivered by the deceased to the defendant on March 29, 1913.

The complaint alleges that the defendant Kate Danahey, by [1] repeated and constant fraudulent representations made by her to Catherine Sullivan, to the effect that she was the only friend who cared for or who would take care of her, induced and persuaded deceased to execute and deliver to her a deed of certain real estate of which she was then possessed, situate in the county of Silver Bow; that long prior to its accomplishment the deceased was so afflicted with disease of mind and body, age and general debility, that she was unable properly to take care of herself, wholly incapacitated from transacting or understanding the nature or effect of business or business transactions, and, on account of her weakened condition of mind, body, and reasoning faculties, by constant and repeated de-

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mands, false representations, and importunities, she was subservient to the will of those under whose care and custody she came, and particularly of the defendant; that while in such condition of mind and body defendant induced deceased to execute and deliver to her the deed aforementioned, which she would not have done but for the oppressive and unfair advantage thus taken of her, the false and fraudulent representations so made, and the great and controlling influence thus exerted. The prayer is that the deed be declared null and void, and that the defendant be ordered to convey the property to the plaintiff as administratrix of the deceased.

The issues were made up by an answer consisting of general denials. The cause was tried by the court without a jury, and written findings were made to the effect that the contract and deed were invalid and without consideration, for the following reasons: That on March 29, 1913, Catherine Sullivan was "so mentally and physically weak that she was entirely incompetent to manage her own affairs, or to realize what she was doing, so far as the conduct of any business or financial affairs was concerned, and was entirely incapable of entering into any valid contract of any kind or description"; and that while in that condition she was by the defendant "unduly influenced and compelled to execute and deliver" the two instruments to her; that she was so physically weak and susceptible to the wiles and undue influence of the defendant that she was unable to resist her dominating will. The court also found that the whole consideration was so fraudulent, unconscionable, unfair and inadequate that the transaction was invalid; and "that the said Kate Sullivan, subsequent to the execution of the said deed, denied making the same, had no knowledge that she had made it, and repudiated it in its entirety. The court also found that the contract for the care and keep of the deceased until her death, being the consideration for the deed, was after its making violated, repudiated and abandoned by the defendant.

Upon the findings of fact, the court made conclusions of law nullifying the contract and deed; awarded to plaintiff the sum

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of \$307.66, as the value of the rents, issues and profits of the property from the date of the transaction, and costs. From the judgment entered thereon and the order refusing a new trial, defendant appeals.

Appellant insists that the complaint is fatally defective in failing to allege that Catherine Sullivan, when she made the deed, was "entirely without understanding" within the meaning of section 3595 of the Revised Codes, and that a judgment based upon a complaint so fatally defective and supported by proof of no greater probative value than is shown here has no legal foundation at all. The trouble with counsel's argument is it assumes that neither the averment nor the proof sustains the finding that Catherine Sullivan was unable to understand the scope and effect of her purported agreement, or that she was unable, by reason of her lack of mental and physical strength, to resist the pressure of the importunities and commands of Mrs. Danahey. Involved and inapt as its averments are, the complaint, as a whole, states enough to admit proof from which the inference could fairly be drawn that the act of Mrs. Sullivan in putting her cross to the documents and handing them over to Mrs. Danahey were physical acts, responsive merely to the overpowering will and commands of the defendant—a substitution of her will for that of Mrs. Sullivan's, and was the consummation of one mind where two are indispensable.

In the case of *Murphy v. Nett*, 47 Mont. 38, 130 Pac. 451, the pleader undertook, in similar language, to make the same charges as are embodied in the complaint in the present action. Expressing the opinion of this court upon the sufficiency of that sort of a pleading, Mr. Justice Sanner uses this language: "As such influence is seldom exercised openly, it cannot be expected that a pleading should specify with particularity the entire details of the manner in which it was used. If ultimate facts are alleged from which the legal conclusion of undue influence fairly follows, it is sufficient to support proof." It therefore necessarily follows that if the proof is consistent with

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and supports the allegations of entire lack of capacity to contract, counsel's argument upon that point is without merit.

He proceeds further, however, with the contention that the [2] complaint is fatally defective in omitting an offer to restore everything of value deceased received from defendant under the agreement, for the reason that the allegations and proof are that she was "of unsound mind" and "not entirely without understanding," and that the deed is valid until by allegation and proof the unsoundness of mind of the grantor has been judicially determined. As we understand section 3595 of our Codes, it declares that a person not having mental capacity enough to comprehend the nature and effect of a transaction "has no power to make a contract of any kind." Section 3595 is identical with section 38 of the Civil Code of California, and section 3596 with section 39 of the same Code of that state. The above two sections, to our minds, evince a legislative attempt to avoid conflicting judicial opinion as to when an instrument is utterly void or merely voidable. In *Ripperdan v. Weldy*, 149 Cal., on page 673, 87 Pac. 276, the language of the two sections referred to is interpreted by the supreme court of that state to our entire satisfaction. That case involved issues similar to those presented here, so that the following from that opinion is pertinent here: "Civil Code, section 38, provides that: 'A person entirely without understanding has no power to make a contract of any kind. * * *' Section 39 reads: 'A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on Rescission of this Code.' In the one case the contract is void; in the other merely voidable. (See *More v. Calkins*, 85 Cal. 177, 24 Pac. 720.) In the case at bar no rescission has been or is attempted. Plaintiffs claim that the deed and bill of sale were absolutely void from the beginning. They attempted to establish a case within the purview of section 38. The phrase 'entirely without understanding,' as used in that section, means a want of capacity to understand trans-

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actions of the kind involved. (*Jacks v. Estee*, 139 Cal. 507, 73 Pac. 247.) It is impossible that a person without the capacity of understanding a particular transaction can in fact understand it."

The sufficiency of the complaint was not tested by demurrer, [3] nor by objection to the admission of evidence at the trial. It will, therefore, upon appeal, be deemed amended to admit the evidence necessary to sustain the judgment. (*Ecclesine v. Great Northern Ry. Co.*, 58 Mont. 470, 194 Pac. 143.) While it cannot as a pleading be commended for its perspicuity, its averments are broad enough to admit evidence to show that Mrs. Sullivan, when she signed the deed, was entirely without understanding and therefore unable to make a contract of any kind within the meaning of section 3595, *supra*. The trial court so construed it, deemed the evidence adduced sufficient to establish her lack of power to make the contract, and so found. This it was at liberty to do under the proof.

Defendant testified that some months after the execution of [4] the deed she solicited and obtained aid from the county authorities of Silver Bow county in providing money for the support of Mrs. Sullivan; that she instituted an inquisition into her sanity, and endeavored to have her committed to the state asylum for the insane; tried to place her in the county poor farm, where she would be freed of the care and expense of keeping her; admitted that she struck her over the head with a window curtain rod; and by other harsh and cruel treatment drove her away from her home, making it necessary for her to find food and shelter in the home of Mrs. Kiley, where she remained until her death. These ingenuous admissions of the defendant relate back to the events which occurred on and prior to March 29, 1913, when she secured the contract and the deed, and justified the court in attributing to the defendant an intention to obtain the property upon a grossly inadequate consideration, and show as well a lack of good faith throughout the entire transaction. Mr. T. J. Harrington, an attorney residing in Butte, was present at the execution of the instru-

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ments, yet he was not called by defendant in her behalf. The above, with all the other evidence in the case, furnishes ample proof to support the findings.

In answer to the contention that the findings are so [5] inconsistent that they cannot all stand together, it is sufficient to say that they do not appear to be so inconsistent that the rendition of a different judgment upon any one or more of them is necessary, or that they have the effect of destroying each other. "This is the test by which must be determined the question whether the judgment as rendered should be allowed to stand." (*In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004.)

Putting the case of appellant in its strongest light, we are unable to find any ground upon which the judgment ought to be disturbed. Therefore it and the order refusing defendant a new trial are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES REYNOLDS, HOLLOWAY and GALEN concur in the result.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 4,935.—STATE EX REL. F. B. POLLEY, RESPONDENT, v. SCHOOL DISTRICT No. 12, BLAINE COUNTY ET AL., APPELLANTS.

Appeal from District Court of Blaine County.

Decided October 24, 1921.

PER CURIAM.—The application of respondent for dismissal of the appeal herein, on the ground that the transcript was not filed within the time prescribed by the rules of this court, is granted and the appeal is accordingly dismissed.

Messrs. Norris & Hurd, for Respondent.

No. 4,743.—STATE EX REL. J. T. GREEN, RESPONDENT, v. J. W. HIMES ET AL., APPELLANTS.

Appeal from District Court, Missoula County; Theodore Lentz, Judge.

Decided November 1, 1921.

PER CURIAM.—This day this cause coming on for judgment and decision, it is ordered that pursuant to the stipulation of the parties, and on the authority of *State ex rel. Samlin v. District Court*, 59 Mont. 600, 198 Pac. 362], that the judgment of the court below made on the fourth day of September, 1919, be and it is hereby reversed and the district court

is ordered to dismiss the proceedings and order the sheriff to return the whiskey and articles seized to the defendants and claimants.

Mr. H. H. Parsons and *Mr. Arthur A. Brown*, for Appellants.

Mr. Wellington D. Rankin, Attorney General, and *Mr. L. A. Foot*, Assistant Attorney General, for Respondent.

No. 4,961.—STATE EX REL. SANTO MAROZZO, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for Writ of Prohibition to the District Court of Silver Bow County, and W. E. Carroll, a Judge thereof, to review an order granting a change of venue.

Decided November 5, 1921.

PER CURIAM.—The application of relator for writ of prohibition is, after due consideration, denied.

Mr. M. S. Galasso and *Mr. N. A. Roterling*, for Relator.

Nos. 4,975 and 4,977.—STATE EX REL. C. H. AND SCOTT K. CASSILL, RELATORS, v. J. E. NEVILLE, SHERIFF, RESPONDENT.

Original applications for Writs of Habeas Corpus to fix bail.

Decided November 23, 1921.

PER CURIAM.—This being return day on above applications for writs of *habeas corpus* to fix bail, counsel for the

respective parties appeared and argued the applications, whereupon, after due consideration, it is ordered that a joint and several bond be furnished in the sum of \$13,000, conditioned as provided by law, and that either or both of the defendants will appear and submit himself or themselves to the court for execution of judgment in case the judgment in either or both causes be affirmed on appeal; said bond to be approved by the clerk of the district court of Powell county.

Mr. C. A. Spaulding and Mr. W. E. Keeley, for Relator.

Mr. Wellington D. Rankin, Attorney General, Mr. L. A. Foot, Assistant Attorney General, and Mr. E. J. Cummins, County Attorney of Powell County, for Respondent.

Nos. 4,976 and 4,978.—STATE EX REL. SCOTT K. CASSILL, RELATOR, v. J. E. NEVILLE, SHERIFF, RESPONDENT.

Original applications for Writs of Habeas Corpus to fix bail.

Decided November 23, 1921.

PER CURIAM.—This being return day on above applications for writs of *habeas corpus* to fix bail, counsel for the respective applications made oral argument; whereupon, after due consideration, it is ordered that a bond in the sum of \$1,000 be furnished, conditioned as provided by law, said bond to be approved by the clerk of the district court of Powell county.

Mr. C. A. Spaulding and Mr. W. E. Keeley, for Relator.

Mr. Wellington D. Rankin, Attorney General, Mr. L. A. Foot, Assistant Attorney General, and Mr. E. J. Cummins, County Attorney of Powell County, for Respondent.

No. 4,982.—W. A. MOORE, COUNTY TREASURER, APPELLANT,
v. NORTHERN PACIFIC RAILWAY CO., RESPONDENT.

Appeal from District Court, Lewis and Clark County.

Decided November 26, 1921.

PER CURIAM.—Pursuant to motion of respondent that appeal herein be dismissed for failure of appellant to file transcript within the time prescribed by the rules of this court, the appeal is dismissed.

Messrs. Gunn, Rasch & Hall, for Respondent.

No. 4,988.—STATE EX REL. MURRAY L. MCGREW ET AL.,
RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for Writ of Prohibition to arrest proceedings in the District Court of Chouteau County in a matter arising under the Prohibition Enforcement Act.

Decided December 1, 1921.

PER CURIAM.—Relators' application for a writ of prohibition this day presented is, after due consideration, denied.

Mr. J. A. Kavaney, for Relators.

No. 4,488.—F. A. PATRICK & CO., APPELLANT, v. L. M. McDONNELL ET AL., RESPONDENTS.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Decided October 31, 1921, and, on December 5, 1921, on motion for rehearing, decision amended to read as follows:

PER CURIAM.—This cause this day came on for judgment and decision; whereupon, on consideration, it is now here ordered and adjudged that the order of the court below dissolving a temporary restraining order and refusing a temporary injunction made on April 29, 1919, be and the same is hereby reversed, the respondent paying costs in this court, the order of reversal being based upon the opinion in cause numbered 4489, entitled *Patrick v. McDonnell*, ante, p. 236, 201 Pac. 1009. It is further ordered that motion for rehearing herein be and it is hereby decided.

Mr. T. F. McCue, for Appellant.

Messrs. Cooper, Stephenson & Hoover, for Respondents.

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Real Property of Intestate—Order of Sale—Proceeding *Quasi in Rem*—Process—Jurisdiction.

2. *Held*, that the matter of procuring an order of sale of real property belonging to the estate of an intestate is one *quasi in rem* and not strictly *in rem*, and that therefore failure to make an order to show cause and to serve it substantially in the manner required by the Codes rendered the sale void.—*Lamont v. Vinger*, 530.

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1. Admissions of defendant, who claimed that the deed sought to be set aside on the ground of want of capacity in the grantor to make it had been made in consideration of a contract for the care and keep of the grantor until her death, showing brutal treatment of the grantor by defendant, an attempt on her part to have her placed in the poor farm, *etc.*, warranted a finding of an intention on the part of the defendant to obtain the property upon a grossly inadequate consideration, as well as of lack of good faith on her part in the transaction. *Kiley v. Darnahey*, 608.

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and not a political one, and hence the supreme court may, on *certiorari*, review a judgment rendered in such a proceeding.—*State ex rel. Weisz v. District Court*, 427.

Same—Refusal—When Proper—Discretion.

2. It is within the discretion of courts to refuse to admit an alien to citizenship who affirms that he will not bear arms in defense of the government.—*State ex rel. Weisz v. District Court*, 427.

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3. Held, on *certiorari*, that a judgment of the district court forever debarring an applicant for naturalization from citizenship is not authorized by the Act of Congress establishing rules for the naturalization of aliens (34 Stats. at Large, 596), and was therefore in excess of its jurisdiction.—*State ex rel. Weisz v. District Court*, 427.

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2. Where preliminary motions and technical objections which should have been raised and settled in advance of the trial under the rules of court were not made by defendant until the commencement of the taking of the testimony on the day of trial, they will on appeal be treated as waived.—*Slack v. Brown*, 99.

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3. Observations made during the course of an opinion upon a subject not involved in the case do not require explanation and are not binding upon the court.—*Mettler v. Ames Realty Co.*, 152.

Error in Admission of Hearsay not Cured by Same Evidence on Cross-examination.

4. Where plaintiff had ineffectually objected to the introduction of patently improper hearsay testimony, saving an exception, the fact that on cross-examination of the witness he elicited a repetition of the statement did not cure the error in admitting it in the first instance or constitute a waiver of his right to urge the error.—*First National Bank v. Middleton*, 209.

Appeal—Bill of Exceptions—Settlement—Unreasonable Delay—Effect.

5. Where defendant did not present his bill of exceptions to the trial judge for settlement until 172 days after plaintiff had served upon him its proposed amendments, in violation of section 6788, Revised Codes, which requires presentment of the bill within ten days after service of the proposed amendments, the record being barren of any excuse for the delay, the supreme court will disregard the bill together with all the questions sought to be presented for review thereby.—*Commercial National Bank v. Thrasher*, 242.

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6. An appeal from a judgment automatically removes the action as well as the judgment to the supreme court, thereby divesting the trial court of further jurisdiction over either.—*State ex rel. O'Grady*, v. District Court, 346.

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8. A board of county commissioners perfected an appeal from an order of the district court commanding it to pay certain claims. Without dismissing it in the supreme court, it subsequently advised the trial court that it would abandon its appeal. That court thereupon amended the judgment in certain respects and ordered the board to pay the claims. The county clerk instead of delivering the warrants to the claimants as ordered, lodged them with the county treasurer and he refused to pay or register them. They were adjudged guilty of contempt. Held, on *certiorari*, that the district court acted in excess of jurisdiction in amending its judgment, and that therefore its order directing payment of the claims was void.—*State ex rel. O'Grady v. District Court*, 346.

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9. The giving of an instruction embodying an abstract rule of law, though erroneous, is not ground for reversal if sufficient qualification and explanation thereof is found in other instructions so that when read together and as a whole it appears that the issues were fully and fairly submitted to the jury.—*Hunt v. Van*, 395.

Judgment in Naturalization Proceeding—Appeal Does not Lie.

10. An appeal does not lie in this state from a judgment in naturalization proceedings.—*State ex rel. Weisz v. District Court*, 427.

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11. Where a motion for nonsuit and the grounds therefor were not incorporated in the bill of exceptions, or the judgment-roll, except as shown in copies of journal entries improperly in the judgment-roll, alleged error in sustaining the motion is not reviewable on appeal.—*Montana Auto & Garage Co. v. Kearney*, 435.

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12. The theory upon which a case was tried in the district court with the acquiescence of the parties is binding upon them on appeal.—*Gay v. Lavina State Bank*, 449.

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13. Where the sufficiency of the complaint was not tested by demurrer or objection to the admission of evidence under it during the trial, it will, on appeal, be deemed amended to admit the evidence necessary to support the judgment.—*Kiley v. Danahey*, 608.

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1. Unless the record affirmatively discloses that the collapse of a witness (plaintiff, a woman) on the witness-stand, in an action for damages for assault and battery, was prearranged and intended as a fictitious appeal to the jury to secure an unfair advantage, it will be presumed on appeal that the verdict was properly arrived at, uninfluenced by any extraneous matter.—Hunt v. Van, 395.

On Woman—What not Excessive Verdict.

2. *Held*, that a verdict for \$3,000 as damages for assault and battery committed on a woman was not so excessive as to warrant the granting of a new trial on the ground that the jury was influenced by passion and prejudice in arriving at it.—Hunt v. Van, 395.

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ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Object and Purpose.

1. The object of an assignment for the benefit of creditors is not to permit speculation with the property of the assignor but to use the assets for the satisfaction of the creditors' claims.—Patrick & Co. v. McDonnell, 236.

Continuance of Business of Assignor—Consent of Creditors Necessary.

2. In the absence of an agreement by all the creditors of an assignor, one merely acquiescing but not actually consenting may enjoin continuance of the business as a going concern, even though it appear that the course pursued may be for the benefit of the creditors.—Patrick & Co. v. McDonnell, 236.

Same—Statute—Limit of Authority of Court.

3. While under Chapter 180, Laws of 1919, the district court may, when necessary for the best interests of the estate of an assignor, authorize his business to be conducted for a limited period of time, it may not do so for an unlimited period.—Patrick & Co. v. McDonnell, 236.

Assignment a Contract—Statute not Retroactive.

4. An assignment for the benefit of creditors is in effect a contract, and therefore where an assignment was made before the passage of Chapter 180, Laws of 1919, giving the district court power under certain circumstances to permit the assignee to conduct the business of the assignor as a going concern, the Act cannot be given a retroactive effect to impair the obligation of such contract.—Patrick & Co. v. McDonnell, 236.

ATTACHMENT.

When Writ may Issue—Determinable from Complaint.

1. The question whether an action is one in which a writ of attachment may issue under section 6656, Revised Codes, must be determined upon the complaint alone.—Heffron v. Thomas, 10.

Action for Breach of Warranty—Improper Issuance of Writ.

2. An action by the buyer of an automobile to recover its purchase price with interest thereon from the date of sale because of failure of title in the seller was not one upon a contract for the direct payment of money, and therefore an attachment issued therein was properly dissolved.—*Heffron v. Thomas*, 10.

Discharge—Defective Complaint—Amendment Permissible.

3. Where discharge of an attachment is sought on the ground that the complaint does not state a cause of action, the inquiry as to the sufficiency of the pleading is confined to the questions whether the action is upon a contract, express or implied, for the direct payment of money; whether it states facts sufficient to constitute a cause of action against the defendant, and, if not, whether it can be amended so as to state a cause of action, a mere defective statement of a cause of action not being a sufficient ground for the discharge of an attachment.—*Savage Tire Sales Co. v. Stuart*, 524.

Security—Transfer of Book Accounts—Pledge.

4. An instrument whereby accounts were transferred from a debtor to a creditor with authority to collect them and apply the proceeds on the indebtedness to the extent of sixty-five per cent, thirty-five per cent being remitted to the debtor, constituted a "pledge" securing payment of the indebtedness, and therefore attachment did not lie on an affidavit stating that it had never been secured by any pledge, *etc.*—*Savage Tire Sales Co. v. Stuart*, 524.

Same—Book Accounts—Pledge—Possession—Constructive Delivery.

5. Constructive delivery of accounts by a debtor to a creditor for purpose of collection is sufficient to satisfy the rule that a pledge is dependent on possession of the thing pledged.—*Savage Tire Sales Co. v. Stuart*, 524.

Same—Book Accounts—Pledge—What not Destructive of Validity.

6. Where a debtor transferred accounts to a creditor as security with authority to collect them and apply the proceeds on the indebtedness, a reservation to the debtor of the right to make collections did not affect the validity of the pledge as between the parties.—*Savage Tire Sales Co. v. Stuart*, 524.

Erroneous Refusal to Dissolve—Remand With Permission to Amend Affidavit.

7. Where, at a hearing to dissolve an attachment, it appeared that while the debt had been originally secured by a pledge of book accounts, a portion of the accounts had proved noncollectible and the security to that extent had therefore become valueless, and the attaching creditor was deprived of an opportunity to amend his affidavit because the trial court adopted his theory that the claim had not been secured and erroneously refused to discharge the writ, its order will be reversed and the cause remanded, with directions to discharge the attachment unless within a given number of days the creditor amend his affidavit to conform to the facts.—*Savage Tire Sales Co. v. Stuart*, 524.

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Cash Bail—Justice Courts—Preliminary Examination—Nature of Undertaking.

1. By a deposit of cash by one accused of crime, in lieu of bail, with a justice of the peace, to assure his appearance at a preliminary examination, the accused enters into a contract with the state which, in legal effect, impliedly contains all of the terms of a bail bond if given for the same purpose, the gist of the contract in either case being that he will appear in the justice court at a specified time, and not in any other court, nor in the justice court at any other time than that specified.—*Hassan v. Earll*, 389.

Same—What Equivalent to Dismissal of Charge.

2. Where a justice of the peace failed to hold a preliminary hearing for appearance at which one accused of crime had made a cash deposit, and the county attorney subsequently filed an information in the district court against accused for the same offense, the result was an abandonment of the proceedings in the justice court equivalent to a dismissal of the charge by the state, entitling accused to a return of the deposit.—*Hassan v. Earll*, 389.

Same—Forfeiture of Bail—When Judgment a Nullity.

3. Upon the filing of an information charging larceny a bench warrant was issued and accused ordered admitted to bail in the sum of \$1,000. The warrant was not served, the accused not arrested and the bail not furnished. Accused under a charge for the same offense had furnished cash bail in the same amount in a justice court under the circumstances above. The district court rendered judgment declaring accused's bail bond forfeited, and the justice delivered the money in his hands to the clerk of the district court who applied it to the satisfaction of the judgment. *Held*, in an action against the justice to recover the cash bail, that the district court never having acquired jurisdiction over accused, and the latter never having furnished bail in that court, the judgment was a nullity, and that plaintiff was entitled to recover.—*Hassan v. Earll*, 389.

BAILMENT.

See, also, Grain Elevators, 1-3.

Definition.

1. A bailment is a delivery of personal property to another in trust upon a contract, express or implied, that the identical thing bailed, or the product of or substitute for that thing, together with the increments, earnings or gains accruing during the period of bailment, shall be redelivered, delivered over or accounted for by the bailee in accordance with the terms of the contract, as where goods or chattels are delivered for the purpose of having something done about them for a reward to be paid by the bailor to the bailee.—*Ferry & Co. v. Forquer*, 336.

Conversion—Crops—Seed Contract.

2. *Held*, in an action for the conversion of a crop of beans grown and harvested by defendant under a contract which provided that defendant should plant a certain acreage with seed furnished by plaintiff and deliver the crop to the latter, he to receive as full compensation a given price per pound, title to the seed and the crop to be in plaintiff until the crop was rejected for reasons mentioned, when title was to vest in defendant, that the transaction was a bailment and not a sale.—*Ferry & Co. v. Forquer*, 336.

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1. A real estate broker intrusted with the privilege of selling the land of his principal, cannot sell to himself, and where he does so, the sale made by him is voidable at the option of the owner.—Crowley v. Rorvig, 245.

Same—Sale to Wife Voidable—Public Policy.

2. Where under a contract made by defendant land owner with plaintiffs (two individuals and a corporation) jointly, which authorized them to sell his property at a fixed price on a commission basis, a sale made to four persons, two of whom were the wives of the individual plaintiffs, was voidable at defendant's option, the fact that the two other purchasers bore no relation whatever to such plaintiffs not altering the rule condemning the sale.—Crowley v. Rorvig, 245.

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1. In an action for the cancellation of notes given for the purchase of farm machinery, absence of allegation and proof that plaintiff had restored everything of value he had received from defendant is fatal.—Rowe v. Emerson-Brantingham Implement Co., 73.

Quieting Title—Cloud upon Title—Complaint—Insufficiency.

2. In an action to cancel instruments claimed to constitute clouds upon the title to mining property, thus preventing plaintiff from obtaining a bidder upon execution sale under a judgment in a mechanic's lien foreclosure proceeding, complaint *held* insufficient to state a cause of action under sections 6115 and 6116, Revised Codes (conceding, but not deciding, that the action could be maintained under those sections). for failure to allege the facts showing the apparent validity of the instruments claimed to constitute clouds as well as the facts showing their invalidity.—Heavilin v. O'Connor, 507.

Deeds—Want of Capacity in Grantor—Complaint—Sufficiency.

3. In an action by an administratrix to set aside a deed on the ground that when her intestate executed it she was without understanding sufficient to make a valid contract, complaint examined and *held* sufficient to permit of proof from which the inference could properly be drawn that the grantor in putting her cross to and delivering the deed acted in obedience to the overpowering will of the grantee. *Kiley v. Danahey*, 608.

Same—Rescission—Complaint.

4. Plaintiff having based her action on the ground that at the time the deceased grantor executed the deed sought to be set aside did not have capacity to make a contract under section 3595, Revised Codes, and not on the ground that she was entitled to rescind under section 3596, an allegation that she had restored or offered to restore everything of value deceased had received from defendant was not required. *Kiley v. Danahey*, 608.

Same—Want of Capacity in Grantor—Inadequate Consideration—Findings.

5. Admissions of defendant, who claimed that the deed sought to be set aside on the ground of want of capacity in the grantor to make it had been made in consideration of a contract for the care and keep of the grantor until her death, showing brutal treatment of the grantor by defendant, an attempt on her part to have her placed in the poor farm, *etc.*, warranted a finding of an intention on the part of the defendant to obtain the property upon a grossly inadequate consideration, as well as of lack of good faith on her part in the transaction.—*Kiley v. Danahey*, 608.

CAVEAT EMPTOR.**Administrators' Sales.**

1. The doctrine of *caveat emptor* applies to an administrator's sale, the purchaser being bound to know the limit of the administrator's authority and determine at his peril whether the proceedings are legal and sufficiently regular to authorize the sale.—*Lamont v. Vinger*, 530.

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1. *Certiorari* lies when jurisdiction has been exceeded and there is no appeal or other plain, speedy and adequate remedy.—*State ex rel. Weisz v. District Court*, 427.

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Judgment Against Sureties on Bond—Error.

2. In an action in claim and delivery the property involved in which had been delivered to plaintiff on furnishing the bond required by law, a judgment for defendant sheriff ordering execution against the

sureties on the bond, though not before the court, was unwarranted.—*First National Bank v. Middleton*, 209.

Livestock—Estrays—Statute of Limitations.

3. Section 6449, subdivision 4, providing that an action for fraud or mistake must be brought within two years after discovery of the facts, applies only to actions for fraud or mistake within the common acceptation of those terms, and not to an action in claim and delivery where defendant honestly and in good faith bought an estray from one wrongfully claiming to be the owner of the animal. *Bennett v. Meeker*, 307.

Same—Estrays—Ignorance of Right of Action—Statute of Limitations.

4. In an action in claim and delivery to recover possession of a cow picked up by defendant and later in good faith purchased from one claiming to be but who was not the owner, defendant not having done anything to prevent the true owner from ascertaining the whereabouts of the animal and learning of his right of action, the fact that plaintiff was ignorant of the circumstances which would have enabled him to bring timely suit did not entitle him to sue after the limitation of two years fixed by subdivision 3 of section 6449, Revised Codes, had run.—*Bennett v. Meeker*, 307.

Livestock—Estrays—Duty of Finder.

5. One finding an estray is under no obligation to advertise the find in a county adjoining that in which the finder resides, or correspond with the recorder of brands in an effort to ascertain the rightful owner.—*Bennett v. Meeker*, 307.

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Real Property—Administrator's Sale—Absence of Order to Show Cause—Sale Void.

1. *Held*, that where the proceedings had before the probate court on application by an administrator for an order of sale of real property disclosed that no order to show cause was ever made, published or served upon the parties interested, the sale was void for want of jurisdiction and open to collateral attack.—*Lamont v. Vinger*, 530.

Same.

2. *Held*, that the general rule that where an order of sale of real property of an intestate recites that an order to show cause was made and due proof of service thereof had to the satisfaction of the court, a purchaser need not look beyond the order and will be protected against a collateral attack, was not satisfied by an order made on the same day on which petition for the order was filed, reciting that the matter was heard "upon due proof to the satisfaction of the court of service according to law of the notice of said hearing," the order showing upon its face that it could not have been issued and served as required by the sections of the Code applicable.—*Lamont v. Vinger*, 530.

Same—Process—Jurisdiction—Waiver.

3. A party not served with process who does not voluntarily appear and contest the action upon its merits does not waive the question of jurisdiction by remaining passive, but may thereafter attack the judgment collaterally.—*Lamont v. Vinger*, 530.

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1. While proof of loss required by a fire insurance policy to be given sixty days before the loss shall become payable may, under certain circumstances, serve the purpose of notice of loss also required, mere notice does not ordinarily supply the place of formal proof, the performance of each of the acts being a condition precedent to the right of the insured to recover in the absence of waiver.—*Smith v. Franklin Fire Ins. Co.*, 441.

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1. Under the constitutional provision that no one shall be deprived of property without due process of law, a curative Act cannot go to the extent of supplying jurisdiction where there was none in the first instance because of lack of notice and an opportunity to be heard.—*Lamont v. Vinger*, 530.

Administrators' Sales—Void Order not Validated by Curative Statute.

2. *Held*, under the above rule (1) that Chapter 4, Laws of 1915, providing that irregularities in obtaining an order of court for the sale of real property of an intestate shall not invalidate the sale was ineffectual to cure the fatal omission of the court to take the steps necessary to give it jurisdiction to make the order.—*Lamont v. Vinger*, 530.

Vested Rights cannot be Destroyed by Statute.

3. Vested rights cannot be destroyed by the legislature.—*Lamont v. Vinger*, 530.

Words and Phrases—Interpretation.

4. In ascertaining the meaning of words used in the Constitution, they will be presumed to have been used in the sense in which they were used generally at the time the Constitution was adopted, and interpreted in the light of the statutes then existing and continued in force by schedule 1 of that instrument.—*State ex rel. Judith Basin County v. Poland*, 600.

Constitution—Legislative Construction—How to be Viewed.

5. While legislative construction of a term used in the Constitution is not binding upon the courts, it is entitled to most respectful consideration.—*State ex rel. Judith Basin County v. Poland*, 600.

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CONTEMPT.

See, also, Appeal and Error, 8.

Disobedience of Void Order not Contempt.

1. For disobedience of a void order of court, a party cannot be adjudged guilty of contempt.—*State ex rel. O'Grady v. District Court*, 346.

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Minutes—Presumption of Correctness—Conclusiveness.

1. The presumption that the minutes of the court showing that counsel for plaintiff was notified of the continuance of his cause until a certain hour the following day, at which hour defendant offered proof of his counterclaim and was awarded judgment, were correct, *held* not overcome by conflicting affidavits of opposing counsel.—*Munger v. Nelson*, 104.

Discretion—Review.

2. A motion for a continuance on the ground of the absence of a witness is addressed to the discretion of the trial court, its action not being reviewable on appeal in the absence of an affirmative showing of prejudice to the movant.—*Hunt v. Van*, 395.

Affidavits—Insufficiency.

3. Affidavits for a continuance not showing when the subpoena for an absent witness was issued, why it was sent to the sheriff of a county other than that of the residence of the witness, or that there was probability or possibility that his personal attendance or deposition could be procured at a date later than that set for trial, were insufficient to show abuse of discretion in overruling the motion.—*Hunt v. Van*, 395.

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When general statutory allegation of performance of condition precedent insufficient, — see Pleading and Practice, 20.

With Indians — Void as against public policy, — see Indians, 3-5.

Construction—Duty of Courts.

1. Courts cannot make new contracts for parties but must construe and enforce them as they are made, if not in contravention of public policy or violative of express provisions of law.—*Ebeling v. Bankers' Casualty Co.*, 58.

Sales—Written Contracts—Warranties—Varying by Parol—Evidence—Inadmissibility.

2. In an action for damages for breach of a clause of a written contract of sale of a threshing-machine warranting it as being as well made, of good material, and that with proper use and management it would do as good work as any other machine of the same size manufactured for the like purpose, evidence of statements made by defendant's agent in making the sale that it would thresh and clean alfalfa as well as any other machine of the same size, *etc.*, was properly rejected as an attempt to vary the terms of the written instrument by parol.—*Rowe v. Emerson-Brantingham Implement Co.*, 73; *State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co.*, 215.

Same—Warranties—Breach—Failure of Notice of Defects—Effect on Right to Recover.

3. Failure of a buyer of a threshing-machine to meet the requirement of the contract making it incumbent upon him, if dissatisfied, to give written notice to the seller within a certain time or return the machine to the place at which he took it into his possession, bars him from recovering for breach of warranty.—*Rowe v. Emerson-Brantingham Implement Co.*, 73.

Void Contracts—Sales—Absence of Consideration—Lack of Mutuality—Options.

4. An agreement to sell and deliver wheat between certain dates, "buyer's option," by the terms of which the buyer did not bind himself to accept it when offered, which lacked both consideration and mutuality, and which was immediately withdrawn upon refusal of the buyer to make part payment understood by the seller to be made upon its execution, was neither a contract of sale, a contract of sale and purchase nor an option contract.—*McCaull-Webster Elevator Co. v. Root*, 82.

Schools—Teacher's Contract—Breach—Findings—Conflicting Evidence.

5. In an action for breach of a school-teacher's contract, the only issue in which was whether plaintiff had voluntarily resigned or was discharged in violation of its terms, tried by the court, the evidence, conflicting in nature, *held* sufficiently substantial to support the finding in plaintiff's favor.—*Ryan v. District No. 1*, 111.

Breach of Contract—Complaint—Indefiniteness.

6. *Held*, that a complaint alleging that plaintiff was the owner of 320 acres of land in B. county, Montana, of the reasonable value of \$3,200, that he sold and conveyed the land to defendant, and that "the said sum has not been paid," was so uncertain as to the description of the property and the consideration for which the transfer was made, as to render it vulnerable to a special demurrer for uncertainty.—*Smallhorn v. Freeman*, 137.

Party Liable—Descriptio Personae—Evidence.

7. Evidence *held* to show that a contract made with defendant "of the Lewistown Hide & Fur Co." was made with him in his individual capacity, and that the words quoted were merely descriptive of defendant and not intended to indicate that the company was bound.—*Sklar v. Belcher*, 171.

Indians—Contracts—Enforceability.

8. *Held*, that section 4087, United States Compiled Statutes, declaring invalid contracts with an Indian not a citizen of the United States unless approved by the secretary of the interior and the commissioner of Indian affairs, refers to contracts affecting Indian allotments, and therefore did not render void promissory notes signed by

an Indian, which did not involve allotment rights.—In re Stinger's Estate, 173.

Same—May Make Valid Contracts.

9. Unless prohibited by statute, an Indian may make valid contracts.—In re Stinger's Estate, 173.

Same—Grazing Contracts—When not Subject to Review.

10. Under the Act of Congress approved February 28, 1891 (26 Stats. at Large, 795), tribal Indians are given primary authority to lease lands owned by them for grazing purposes, the determination of their council being conclusive upon the federal government in the absence of evidence of fraud or undue influence.—White Bear v. Barth, 322.

Interpretation.

11. A contract must receive such interpretation as will give effect to the intention of the parties at the time of contracting, the intention to be gathered from the entire agreement, its substance rather than its form being controlling.—Ferry & Co. v. Forquer, 336.

Railroads—Livestock Shipments—Published Tariffs Part of Contract.

12. The published tariffs of a carrier, filed with and approved by the Interstate Commerce Commission, requiring a notation on the contract of shipment and the waybills of points at which livestock were to be fed and watered, form a part of the contract of shipment and are conclusive on the shipper (as well as the carrier), whether he has actual knowledge of them or not.—Cook v. Northern Pacific Ry., 573.

Same—Contract—Custom Varying Writing—Evidence—Inadmissibility.

13. Where the terms of a contract of shipment of livestock were clear and explicit as to where stops should be made for feeding and resting, parol testimony to the effect that it was customary for shippers to have them stop for those purposes at another point was inadmissible.—Cook v. Northern Pacific Ry. Co., 573.

Same—Prior Oral Negotiations Merged in Contract—Parol Evidence—Varying Terms of Writing.

14. Prior oral negotiations and directions as to points at which livestock should be stopped for resting and feeding were merged in the contract of shipment, where it and the waybills bore notations stating the points at which stops were to be made, and therefore parol testimony of directions to make other stops was incompetent as an attempt to vary the terms of the written contract.—Cook v. Northern Pacific Ry. Co., 573.

Same—Livestock Shipment—Ostensible Authority of Attendant to Change Contract—Evidence—Insufficiency.

15. A livestock shipment on its face bore a notation that the lambs constituting the shipment should be stopped at a certain point for feed and rest. The attendant in charge had no authority, either actual or ostensible, to change the contract in any particular. The published tariffs forming a part of the contract provided that the points at which animals were to be stopped could not be changed otherwise than upon written instruction of the owner or his authorized agent, the question of ownership or agency to be determined by proper identification. The attendant, with the bill of lading in his possession, directed defendant carrier's agent in writing to change the notation as to the place where the stop should be made, stating that he was the person in charge. *Held*, that the burden of proving that the attendant had ostensible authority to make the change in the contract was upon defendant carrier, that the showing made to

the agent by the attendant as to his authority to make the change was insufficient, and that therefore the court properly struck all evidence relating to the change.—Cook v. Northern Pacific Ry. Co., 573.

Real Property—Contract of Sale—Material Misrepresentation—Rescission.
16. A misrepresentation made by the owner of a ranch to its purchaser that a barn, and a spring in close proximity thereto, inclosed with a fence were a part of the property sold, was material, and sufficient ground for rescission.—Fontaine v. Lyng, 590.

Same—Rescission—When Right not Waived.

17. Where the purchaser of ranch property waited nearly a year for the vendor to make good his promise that he would buy the land upon which a barn and spring were located and which he had falsely represented as being included in the property sold, the former's acts in asking for an extension of time for payment of an installment of the purchase price due and cropping the land in the meantime did not constitute a waiver of his right to rescind.—Fontaine v. Lyng, 590.

Same—Rescission—When Waived.

18. By continuing in possession of ranch property for more than five months after commencement of suit to rescind, the vendee waived his right of rescission under section 5065, Revised Codes, making it incumbent upon a party desiring to rescind to tender back possession and to keep the tender good by removal from the premises.—Fontaine v. Lyng, 590.

Same—Breach of Contract—Forfeiture of Part Payments—When Relief Proper.

19. Notwithstanding the provision in a contract of sale of ranch land that on default of deferred payments all prior payments should be deemed forfeited as rental, the party in default may obtain relief from forfeiture if not guilty of grossly negligent, willful or fraudulent breach of duty, on presentation of such grounds therefor as appeal to the conscience of a court of equity.—Fontaine v. Lyng, 590.

Same—Relief from Forfeiture of Part Payments—When Proper.

20. *Held*, under the above rule (paragraph 19), that where a purchaser of ranch lands had paid \$10,000 of the purchase price when he sought to rescind under circumstances showing waiver of his right to rescind, and defendants in their counterclaim asked for cancellation of the contract on account of its breach, and forfeiture of the amount paid, he was entitled to be relieved of forfeiture of the amount paid over and above full compensation for the use of the property, if not guilty of gross negligence or willful or fraudulent breach of duty.—Fontaine v. Lyng, 590.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries.

CONVERSION.

Of grain by warehouseman,—see Grain Elevators, 1-10.

Measure of Damages.

1. Where an action in conversion has been prosecuted with reasonable diligence, the plaintiff may exercise the option granted him by section 6071, Revised Codes, of demanding the highest market value

of the property at any time between the conversion and the verdict, by giving notice, if he has not otherwise limited himself by his pleading, at any time, before the submission of the cause for verdict or decision.—*State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co.*, 215.

Statutory Measure of Damages Controlling.

2. Where plaintiff in an action in conversion has brought himself within the rule requiring diligence in prosecuting the action (Rev. Codes, sec. 6071), the fact that the measure of damages recoverable under it may be inequitable and unjust cannot deprive him of his right to recover the highest market value of the property at any time between the conversion and the verdict, at plaintiff's option, which he might have obtained but for the wrongful act of defendant.—*State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co.*, 215.

Date.

3. Ordinarily the date of demand and refusal is the date of conversion, but, if an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relate back to that event.—*State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co.*, 215.

Minimizing Damages.

4. A bailor of grain stored in a public elevator is under no legal obligation to purchase grain in the open market in order to minimize the damages for which the warehouseman may be liable in case of wrongful conversion of the grain.—*State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co.*, 215.

Seed Contract—Transaction a Bailment, not Sale.

5. *Held*, in an action for the conversion of a crop of beans grown and harvested by defendant under a contract which provided that defendant should plant a certain acreage with seed furnished by plaintiff and deliver the crop to the latter, he to receive as full compensation a given price per pound, title to the seed and the crop to be in plaintiff until the crop was rejected for reasons mentioned, when title was to vest in defendant, that the transaction was a bailment and not a sale.—*Ferry & Co. v. Forquer*, 336.

CORPORATIONS.

Corporate capacity—Denial—Sufficiency,—see Pleading and Practice, 16.

Boards of Directors—Power to Sell Assets—Statutes.

1. Under the common-law powers reserved to corporations by the proviso in section 3897, Revised Codes, and enumerated in a general way in sections 3833 and 3889, the board of directors of a going corporation could, in the proper pursuit of its business and within the purposes of its creation, against the dissent of a minority of its stockholders, sell a leasehold interest in realty with improvements thereon, and where such sale was made before plaintiffs had judgment against the selling corporation, they acquired no title under execution sale, and nonsuit was properly granted in their action in ejectment against the purchaser.—*Wortman v. Amusement Co.*, 89.

COUNTERCLAIM.

Judgment by default on—Failure to reply,—see Judgments, 1, 2.

Instructions on Counterclaim not Supported by Facts—Error.

1. An instruction based on a counterclaim wholly unsupported by the evidence was inapplicable to the facts and erroneous.—*Montana Auto etc. Co. v. Kearney*, 435.

COUNTIES.

New Counties—"County Property"—Adjustment of Indebtedness.

1. "Property of the county" within the meaning of section 3, Article XVI, Constitution, under which, when a new county is created, the net indebtedness of the old county, its ratable proportion of which the new one must pay, is to be determined by deducting from its total indebtedness the value of all property of the old county, held to mean such property as a county holds and can sell.—State ex rel. Judith Basin County v. Poland, 600.

Same—Bridges—Property of State.

2. A completed bridge used by the public is a part of the public highway and belongs to the state, and is therefore not county property such as may be considered in adjusting the indebtedness between an old and a new county.—State ex rel. Judith Basin County v. Poland, 600.

Construction and Maintenance of Bridges.

3. While the obligation to build and maintain highways, including bridges, primarily devolves upon the state, it may impose, and in Montana has imposed, that duty upon the counties and municipalities. State ex rel. Judith Basin County v. Poland, 600.

New Counties—Incomplete Bridges not County Property—Adjustment of Indebtedness.

4. Held, that a partly finished bridge constructed with funds obtained by a bond issue is not such county property as it may sell, and therefore cannot be taken into consideration as county property (paragraph 2) in the adjustment of indebtedness between an old and a new county.—State ex rel. Judith Basin County v. Poland, 600.

Same — Indebtedness — Adjustment — *Mandamus* — When not Proper Remedy.

5. Held, that where the board of commissioners of a county a portion of which was thereafter included in a new county, in order to obtain favorable action by the electors of that portion on a proposed issue of road bonds, passed a resolution, amounting to a promise merely, that in the event the bonds were authorized, a certain proportion of the receipts would be devoted to road improvement in their district, their breach of trust in thereafter failing to carry out their promise could not be remedied by writ of mandate to compel the board of adjusters of the indebtedness between the old and the new county to charge the old county with the amount the district should have received under the resolution, the New Counties Act (Laws 1919, Chap. 226) not authorizing the adjusters to take such action.—State ex rel. Judith Basin County v. Poland, 600.

Same—County Records—Not County Property to Enter into Adjustment of Indebtedness.

6. Public record books of a county are not county property to be taken into consideration by a board of adjustment of county indebtedness between an old and a new county.—State ex rel. Judith Basin County v. Poland, 600.

CRIMINAL LAW.

See, also, Bail; Intoxicating Liquors.

Homicide—*Corpus Delicti*—Evidence—Establishes What.

1. In prosecutions for murder, proof of the *corpus delicti* involves the establishment of the fact that a murder has been committed, but it comprehends neither the identity of the person alleged to have been killed nor the killing by the person accused.—State v. Riggs, 25.

Same—Death—Criminal Agency—Proof.

2. In homicide, the fact of the death being established, it must affirmatively be made to appear that it resulted from a criminal agency, that it was not due to natural causes or suicide, but was due to the act of the defendant.—State v. Riggs, 25.

Same—Death—Accident—Natural Causes—Evidence—Insufficiency.

3. Where the evidence, on the one hand, shows that death may have been the result of natural causes or suicide, *or*, on the other, may have been due to criminal agency, a conviction cannot be sustained, since proof of death cannot rest in the disjunctive.—State v. Riggs, 25.

Same—Death—Circumstantial Evidence—Failure of Proof.

4. Where the circumstances relied on by the state to prove that death was caused by the criminal act of another are consistent with the theory that it was produced by natural causes, there is a failure of proof.—State v. Riggs, 25.

Same—Death Due to Criminal or Innocent Cause—Evidence—Rule.

5. Where an act may be attributed to a criminal act or an innocent cause, it will be attributed to the innocent rather than the criminal one.—State v. Riggs, 25.

Same—Circumstantial Evidence—Definition.

6. Circumstantial evidence is the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind, and may be either certain, *i. e.*, that from which the conclusion naturally follows, or uncertain, *i. e.*, that from which the conclusion does not but may follow, and is obtained by process of reasoning only.—State v. Riggs, 25.

Same—Circumstantial Evidence—Sufficiency—Rule.

7. Where a conviction is sought solely on circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any rational hypothesis other than his guilt.—State v. Riggs, 25.

Same—Circumstantial Evidence—Quantum of Proof Necessary.

8. The same degree of certainty is required to warrant a conviction on circumstantial evidence as when the evidence is direct, and in either case the jury must be satisfied beyond a reasonable doubt before they can find defendant guilty.—State v. Riggs, 25.

Same—Circumstantial Evidence—When Conviction not Sustained.

9. Where the evidence in a criminal cause is unsubstantial or wholly lacking in material particulars, or where it is meager, fragmentary, disconnected or speculative, conviction cannot be sustained.—State v. Riggs, 25.

Information—Verification Unnecessary.

10. An information charging a public offense need not be verified by the county attorney.—State v. Paine, 270.

Same—When Sufficient.

11. An information stating the proper title of court and cause and containing a statement of the facts constituting the offense, charged in ordinary and concise language so as to enable a person of common understanding to know what was intended, is sufficient.—State v. Paine, 270.

Intoxicating Liquors—Filing Information—Preliminary Examination of Witnesses—Statute Directory.

12. Failure of the county attorney to conduct the preliminary examination of witnesses authorized by section 12 of Chapter 143, Laws of 1917, before filing an information by leave of court, is not a ground for setting it aside, the section being directory only, and designed to

extend the scope of the prosecuting officer's authority to secure evidence, not to advise the defendant of the evidence he thus obtains.—*State v. Paine*, 270.

Homicide—Jurors—Opinion Founded on Newspaper Reports—Not Disqualification.

13. A juror who on his *voir dire* stated that he had read in the newspapers an account of the homicide for which plaintiff was on trial; that he had formed an opinion therefrom which it would take evidence to remove, but that in determining the case he would base his verdict upon the evidence and be bound by the court's instructions; that there was nothing known to him why he could not try the case fairly, *etc.*, *held* competent.—*State v. Juhrey*, 413.

Same—Jurors—*Voir Dire* Examination—Contradictory Answers—Discretion.

14. Where a juror on his *voir dire* examination gives contradictory answers, it is the function of the trial court to pass upon the evidence and determine the qualifications of the juror, its determination being final unless it appears that there has been abuse of discretion.—*State v. Paine*, 413.

Same—Witnesses—Cross-examination—Curtailement, When not Reversible Error.

15. Where a witness for the state has been cross-examined at great length as to her relations with defendant, refusal to allow a further question on the same subject to be answered was not reversible error.—*State v. Juhrey*, 413.

Same—Evidence—Conversation With Deceased—Hearsay.

16. A question whether witness had a conversation with deceased in his lifetime concerning him (deceased) and his wife, was properly excluded as immaterial and hearsay.—*State v. Juhrey*, 413.

Same—Evidence—Sufficiency.

17. Evidence *held* sufficient to warrant conviction of murder in the first degree.—*State v. Juhrey*, 413.

Same—Motive—Evidence—Admissibility.

18. In a prosecution for homicide, evidence of a robbery for participation in which deceased, a deputy sheriff, was attempting to arrest defendant was properly admitted for the purpose of showing motive to commit the crime for which defendant was on trial.—*State v. Fountain*, 461.

Same—Circumstantial Evidence—Sufficiency.

19. Evidence, circumstantial in character, *held* sufficient to warrant conviction of murder in the second degree, under the rule that where conviction is sought solely upon circumstantial evidence, the criminal circumstances proved must be consistent with each other and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.—*State v. Fountain*, 461.

Same—New Trial—Newly Discovered Evidence—Lack of Diligence.

20. Where during the trial counsel for defendant cross-examined witnesses for the state with reference to the question whether certain marks claimed by the state to have been made by bullets were not made by blasting a beaver dam, an affidavit, on motion for new trial on the ground of newly discovered evidence, that the dam had been blasted shortly after the shooting occurred disclosed a lack of diligence to discover the facts and was insufficient to warrant a retrial.—*State v. Fountain*, 461.

Same—Alien as Juror—Evidence—Insufficiency.

21. Evidence *held* sufficient to show that a foreign-born juror sitting in a capital case was a citizen of the United States at the time of the trial.—State v. Vuckovich, 480.

Same—Jury Trial—Extent of Right of Defendant.

22. A party litigant in neither a civil nor criminal case has a vested right to have his case passed upon by a jury taken from the panel drawn at any certain time, his rights in that respect being sufficiently protected if a fair and impartial jury was drawn at the time and in the manner recognized by law.—State v. Vuckovich, 480.

Same—Jury Panel—Drawing Special Jury—When Defendant may not Complain.

23. Where the trial court, instead of ordering a panel of regular jurors drawn in a number deemed by it sufficient for the term, had them drawn under three successive orders as occasion required, defendant was not in position to complain of the procedure followed, he not having been prejudiced thereby and section 6348, Revised Code of 1907, not limiting the number which may be drawn.—State v. Vuckovich, 480.

Same—Information—Filing Without Preliminary Examination.

24. The district court may grant leave to file an information without previous examination of defendant by a committing magistrate.—State v. Vuckovich, 480.

Same—Information—Verification by County Attorney—Effect.

25. Verification of an information by the county attorney is not a proper cause for setting it aside.—State v. Vuckovich, 480.

Same—Information—Surplusage.

26. An information charging murder in the first degree, otherwise sufficient, was not rendered insufficient by the absence of the words "a felony," after the words "murder in the first degree," hence the insertion of the two words by order of court upon complaint that the copy served upon defendant did not contain them did not render the information subject to a motion to quash.—State v. Vuckovich, 480.

Same—Evidence Showing Feeling Between Defendant and Accused Admissible.

27. Testimony of a police magistrate that defendant had on a certain day pleaded guilty to a charge of disturbing the peace by committing an assault upon deceased, and that of a police officer that he had advised defendant to keep away from the house of deceased to avoid trouble was admissible as showing the condition of feeling existing between the parties.—State v. Vuckovich, 480.

Same—Exhibits—Admissibility.

28. The bullet extracted from the body of deceased, whether secretly done or not, an empty pistol shell found at the scene of the homicide, a pistol and loaded shells taken from the person of the defendant, etc., were properly admitted in evidence.—State v. Vuckovich, 480.

Same—Experiments Made Out of Court—Admissibility.

29. Evidence of experiments made out of court with a pistol and shells taken from the person of defendant were admissible within the discretion of the trial court, if it tended to corroborate the position taken by an expert witness, caution being exercised in receiving it.—State v. Vuckovich, 480.

Same—Evidence—Sufficiency.

30. Evidence *held* sufficient to warrant conviction of murder in the first degree.—State v. Vuckovich, 480.

CROPS.

Seed contract—When transaction a bailment, and not a sale,—see Conversion, 5.

CROSS-EXAMINATION.

Technical violation of rule, harmless error,—see Evidence, 1.

What does not cure error in admission of hearsay testimony,—see Evidence, 2.

When curtailment not reversible error,—see Criminal Law, 15.

CURATIVE STATUTES.

See Statutes and Statutory Construction, 3, 4.

CURING ERROR.

Error in admitting hearsay testimony not cured by eliciting same testimony on cross-examination,—see Appeal and Error, 4.

CUSTOM AND USAGE.

Parol testimony of custom pursued by shippers of livestock in making shipments, inadmissible as tending to vary written contract,—see Evidence, 11.

When not available as defense,—see Grain Elevators, 4.

DAMAGES.

Excessive,—see Verdicts.

Measure of, in action for conversion,—see Conversion, 1, 2.

Minimizing,—see Grain Elevators, 8.

DEEDS.

Cancellation—Want of capacity in grantor—Inadequate consideration,—see Cancellation of Instruments, 3-5.

DEFAULT JUDGMENTS.

See Judgments.

DEFENSES.

Custom and usage, when not defense,—see Grain Elevators, 4.

DEMAND.

Sufficiency of allegation in action on fire insurance policy,—see Insurance, 9.

DISCRETION.

Denial to admit alien to citizenship,—see Aliens, 2.

Determining qualifications of a juror,—see Criminal Law, 14.

Granting of a continuance,—see Continuance, 2.

DISTRICT COURTS.

District Judges—Term of Office—Expiration—Subsequent Acts Invalid.

1 Where the term of a district judge expired at midnight on December 31, 1920, the day preceding the first Monday in January following the general election at which his successor had been elected, an order

denying a motion for a new trial, made by him on December 31 but which he was prevented from lodging with the clerk because, when attempting to do so, he found the office closed for the day, handed by him to the clerk on January 3, 1921, with direction to enter it as of December 31, was his personal act and void, he then no longer being vested with judicial authority.—*Marcellus v. Wright*, 274.

May Correct Minutes.

2. The district court may correct its minutes to speak the truth.—*Marcellus v. Wright*, 274.

Correcting Minutes—Consideration of Affidavits Proper.

3. On motion to annul an order denying a new trial on the ground that it was made by the judge after expiration of his term of office, his successor, in deciding whether his predecessor made the order after his term had expired, was not limited to the minutes of the court, but could consider the facts disclosed by the affidavits filed in support of and in opposition to the motion.—*Marcellus v. Wright*, 274.

Aliens—Naturalization—Judicial Proceeding—Jurisdiction.

4. The district courts of Montana possess concurrent jurisdiction with the federal courts (within the limitations prescribed by Act of Congress relating to the subject) to naturalize aliens, and therefore when such power is exercised by them, the proceeding is a judicial and not a political one, and hence the supreme court may, on *certiorari*, review a judgment rendered in such a proceeding.—*State ex rel. Weisz v. District Court*, 427.

Civil Officers—Removal—Proceedings Criminal in Nature—District Judges—Disqualification by Affidavit Under Fair Trial Law not Permitted.

5. *Held*, that proceedings for the removal of civil officers under section 9006, Revised Codes, as amended by Chapter 25, Laws of 1917, are criminal in their nature, and that therefore neither party has the right to file an affidavit disqualifying a district judge for imputed bias or prejudice under section 6315, Revised Codes, as amended by chapter 114, Laws of 1909. (MR. JUSTICE HOLLOWAY dissenting.)—*State ex rel. Houston v. District Court*, 558.

DIVORCE.

Attorneys' fees,—see Husband and Wife.

EJECTMENT.

Plaintiff must Prevail upon Integrity of Own Title.

1. In ejectment, plaintiff must prevail, if at all, upon the integrity of his own title, and not the infirmity of that of defendant.—*Wortman v. Luna Park Amusement Co.*, 89.

Title—Cross-examination—Technical Violation of Rule—Harmless Error.

2. A technical violation of the rule of cross-examination in permitting defendant company to show affirmatively by plaintiff's witness that title to the property in question was in it and not in plaintiff—a vital issue in the case—was not reversible error in the absence of a showing of prejudice.—*Wortman v. Luna Park Amusement Co.*, 89.

EQUITY.

See, also, particular subjects relating to Equity.

Jurisdiction of court sitting in probate,—see Probate Proceedings, 3–8.

ESTATES OF DECEASED PERSONS.

Real property—Administrators' Sales,—see Executors and Administrators.

EVIDENCE.**ESTRAYS.**

See Livestock.

EVIDENCE.

See, also, Criminal Law.

Circumstantial evidence,—see Criminal Law, 1-9, 19.

Varying written contracts by parol testimony,—see Contracts, 2, 13, 14.

Cross-examination—Technical Violation of Rule—Harmless Error.

1. A technical violation of the rule of cross-examination in permitting defendant company to show affirmatively by plaintiff's witness that title to the property in question in an action in ejectment was in it and not in plaintiff was not reversible error in the absence of a showing of prejudice.—*Wortman v. Amusement Co.*, 89.

Error in Admission of Hearsay Testimony not Cured by Same Testimony Brought Out on Cross-examination.

2. Where plaintiff had ineffectually objected to the introduction of hearsay testimony, saving an exception, the fact that on cross-examination he elicited a repetition of the statement did not cure the error in admitting it in the first instance or constitute a waiver of his right to urge error.—*First National Bank v. Middleton*, 209.

Water Rights—Complaint—Amendment Before Retrial—Identity of Issues—Deceased Witness—Evidence on Former Trial—Admissibility.

3. Where a retrial of a water right suit was had upon a complaint which had been amended after the first trial, without, however, changing the issues, the only difference between the two pleadings being that in the amended one an allegation appeared, not found in the original pleading, that an agreement had been entered into by the predecessors of the parties fixing the amount of water each should be entitled to use, evidence relating to the agreement, given by one of them at the first trial, who had died in the interim, was admissible, the record showing that the witness had been thoroughly cross-examined touching its execution, terms and conditions.—*Nelson v. Gough*, 301.

Private Writings—When Deemed Lost.

4. A showing that the owner of a private writing removed to a foreign country sufficiently accounts for its nonproduction to warrant admission of oral testimony to prove its contents, the presumption being that he took it with him.—*Nelson v. Gough*, 301.

Lost Private Writings—Contents—Evidence—Sufficiency.

5. Under the rule that proof of the contents of a lost writing is sufficient if the witness who has read it can state them substantially and with reasonable accuracy, testimony giving approximately the date of a written agreement adjusting water rights between two claimants, the circumstances under which it was made and the subject matter and disposition made of their respective contentions was not objectionable as not fully stating its terms.—*Nelson v. Gough*, 301.

Witnesses—Credibility.

6. The evidence of a witness, to be credible, must be within reason.—*Wegge v. Great Northern Ry. Co.*, 377.

Statutory Laws of Other States—Judicial Notice.

7. Courts of this state do not take judicial notice of the statutory laws of another state; hence, since certified copies of public records of a foreign state, if admitted in evidence in this state, can be given only such faith and credit as would be given them in the foreign state under its laws, it is incumbent upon the party introducing them to show what the law of that state is in that respect, otherwise the court

may disregard them.—*American Savings Bank & Trust Co. v. Chapman*, 408.

Conversation With Deceased—Hearsay.

8. A question whether witness had a conversation with deceased in his lifetime concerning him (deceased) and his wife, was properly excluded as immaterial and hearsay.—*State v. Juhrey*, 413.

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Railroads—Livestock Shipments—Prior Oral Negotiations Merged in Contract—Parol Evidence—Varying Terms of Writing.

14. Prior oral negotiations and directions as to points at which livestock should be stopped for resting and feeding were merged in the contract of shipment, where it and the waybills bore notations stating the points at which stops were to be made, and therefore parol testimony of directions to make other stops was incompetent as an attempt to vary the terms of the written contract.—*Cook v. Northern Pacific Ry. Co.*, 573.

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EXCEPTIONS.

Hearsay Testimony—Error not Cured by Testimony Elicited on Cross-examination.

1. Where plaintiff had excepted to the introduction of hearsay testimony, the fact that on cross-examination of the witness he brought out the same character of testimony, did not cure the error or constitute a waiver of his right to urge error.—*First National Bank v. Middleton*, 209.

EXECUTION.

Against sureties on bond in claim and delivery action not parties to action unwarranted,—See Claim and Delivery, 2.

Proceedings Supplemental—Power of Court.

1. In proceedings supplemental to execution the only powers possessed by the court are those given it by sections 6853 and 6854, Revised Codes.—*Johnson v. Lundeen*, 145.

Same—Denial of Indebtedness by Garnishee—Procedure.

2. Where, in proceedings supplemental, the garnishee denies any indebtedness to the judgment debtor, the court has no authority to try the question and order payment to be applied to the satisfaction of the judgment, but must either order the judgment creditor to institute an action to determine the fact in dispute or discharge the garnishee.—*Johnson v. Lundeen*, 145.

Same—Question of Title to Property not Triable.

3. Contested claims as to title to property sought to be subjected to execution cannot be litigated in supplementary proceeding.—*Missoula T. & S. Bank v. Northwestern A. & T. Ins. Co.*, 370.

Same—Affidavit—Contents.

4. Supplementary proceedings are provided to aid the judgment creditor in reaching property of the judgment debtor which cannot otherwise be reached by the judgment; hence before they can be resorted to, the creditor must by affidavit make it appear that he has a valid and subsisting judgment against the debtor which has been unpaid, in whole or in part, and that execution issued has been returned unsatisfied in whole or in part.—*Missoula T. & S. Bank v. Northwestern A. & T. Ins. Co.*, 370.

Same—Affidavit—Contents.

5. An affidavit on which relief by supplementary proceedings was asked, setting forth no more than the entry of judgment and issuance of execution thereon, thus failing to disclose that the judgment was then unpaid, in whole or in part, or that it had been returned unsatisfied or could not be satisfied out of property other than that claimed by an intervener, an order refusing to permit the creditor to bring an action against the latter under section 6854, Revised Codes, was correct.—*Missoula T. & S. Bank v. Northwestern A. & T. Ins. Co.*, 370.

EXECUTORS AND ADMINISTRATORS.

Property of Intestate—Title in Whom.

1. Under section 4819, Revised Codes, title to the property of one who dies intestate passes immediately to the heirs, subject to the control of the district court and to the possession of the administrator for the purposes of administration.—*Lamont v. Vinger*, 530.

Recovery of Realty by Heir—Statute of Limitations.

2. An action to recover real property sold by an administrator under an alleged void order of sale, brought after the limitation prescribed by section 7596, Revised Codes, within which an heir must commence his action had expired, but within the three-year period after reaching his majority (sec. 7597), was not barred.—*Lamont v. Vinger*, 530.

Recovery of Real Property—Right of Action in Administrator not Exclusive.

3. The right given to an administrator by section 7604, Revised Codes, to maintain an action for the recovery of real property of his intestate (if applicable to an action to recover property sold by him under an order of sale) is not exclusive, section 7502 conferring the same right upon the heirs.—*Lamont v. Vinger*, 530.

Administrator's Sale—Absence of Order to Show Cause—Sale Void—Collateral Attack.

4. *Held*, that where the proceedings had before the probate court on application by an administrator for an order of sale of real property disclosed that no order to show cause was ever made, published or served upon the parties interested, the sale was void for want of jurisdiction and open to collateral attack.—*Lamont v. Vinger*, 530.

Same.

5. *Held*, that the general rule that where an order of sale of real property of an intestate recites that an order to show cause was made and due proof of service thereof had to the satisfaction of the court, a purchaser need not look beyond the order and will be protected against a collateral attack, was not satisfied by an order made on the same day on which petition for the order was filed, reciting that the matter was heard "upon due proof to the satisfaction of the court of service according to law of the notice of said hearing," the order showing upon its face that it could not have been issued and served as required by the sections of the Code applicable.—*Lamont v. Vinger*, 530.

Same—Actions in *Rem*—Process—Jurisdiction.

6. Unless a proceeding is strictly *in rem*, a valid judgment cannot be rendered affecting the rights of third parties if they were not served with process or appeared and had an opportunity to be heard. *Lamont v. Vinger*, 530.

Same—Order of Sale—Proceeding *Quasi in Rem*—Process—Jurisdiction.

7. *Held*, that the matter of procuring an order of sale of real property belonging to the estate of an intestate is one *quasi in rem* and not strictly *in rem*, and that therefore failure to make an order to show cause and to serve it substantially in the manner required by the Codes rendered the sale void.—*Lamont v. Vinger*, 530.

Same—Order of Sale of Real Property—Power of Court Special.

8. The authority of the probate court to order a sale of real property of an intestate is not included in its general jurisdiction over the administration but is special and limited and can be exercised only in the manner prescribed by the statute.—*Lamont v. Vinger*, 530.

Same—Proceeding to Sell Property *in Invitum*—Substantial Compliance With Statutes Necessary.

9. So far as a nonconsenting heir is concerned, the proceeding to sell real property of his ancestor is *in invitum*, and the party who traces his title through such a sale must be able to show a substantial compliance with the law.—*Lamont v. Vinger*, 530.

EXCEPTIONS.

Hearsay Testimony—Error not Cured by Testimony Elicited on Cross-examination.

1. Where plaintiff had excepted to the introduction of hearsay testimony, the fact that on cross-examination of the witness he brought out the same character of testimony, did not cure the error or constitute a waiver of his right to urge error.—*First National Bank v. Middleton*, 209.

EXECUTION.

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Same—Sale of Real Property—Notice Indispensable.

10. In the absence of waiver, notice to the heirs of an intestate of a contemplated sale of real property is indispensable.—*Lamont v. Vinger*, 530.

Same—Process—Jurisdiction—Waiver—Collateral Attack.

11. A party not served with process who does not voluntarily appear and contest the action upon its merits does not waive the question of jurisdiction by remaining passive, but may thereafter attack the judgment collaterally.—*Lamont v. Vinger*, 530.

Jurisdiction—Due Process of Law—Curative Statutes—Limit of Curative Power.

12. Under the constitutional provision that no one shall be deprived of property without due process of law, a curative Act cannot go to the extent of supplying jurisdiction where there was none in the first instance because of lack of notice and an opportunity to be heard.—*Lamont v. Vinger*, 530.

Administrators' Sales—Void Order not Validated by Curative Statute.

13. *Held*, under the above rule (12) that Chapter 4, Laws of 1915, providing that irregularities in obtaining an order of court for the sale of real property of an intestate shall not invalidate the sale was ineffectual to cure the fatal omission of the court to take the steps necessary to give it jurisdiction to make the order.—*Lamont v. Vinger*, 530.

Same—Rule of *Caveat Emptor* Applies.

14. The doctrine of *caveat emptor* applies to an administrator's sale, the purchaser being bound to know the limit of the administrator's authority and determine at his peril whether the proceedings are legal and sufficiently regular to authorize the sale.—*Lamont v. Vinger*, 530.

EXHIBITS.

What admissible in homicide case,—see *Criminal Law*, 28, 29.

EXTORTION.

Insufficiency of complaint,—see *Pleading and Practice*, 14.

FAIR TRIAL LAW.

Disqualification of district judge—Inapplicability of Act,—see *District Courts*, 5.

FENCES.

See *Railroads*, 1-5.

FINDINGS.

See, also, *Admissions*, 1.

Inconsistent Findings—Rule.

1. Findings complained of as fatally inconsistent are not so unless they are so inconsistent as to require the rendition of a different judgment upon any one or more of them or they have the effect of destroying each other.—*Kiley v. Danahey*, 608.

FIRE INSURANCE.

See *Insurance*, 4-9, 13-18.

FORFEITURES.

When judgment of forfeiture of cash bail a nullity,—see Bail, 3.

When relief of forfeiture of part payment on land contract proper,—see Contracts, 19, 20.

FRAUD.

See, also, Contracts; Insurance, 3.

When Question of Fact—When of Law.

1. The question of fraud is always a question of fact for the jury, unless the evidence is uncontradicted and it is impossible to draw any inference from it other than that it entered into the particular transaction, whereupon it becomes one of law for the court.—Williams v. Mutual Life Ins. Co., 66.

GARNISHMENT.

Proceedings supplemental,—see Execution, 1, 2.

GENERAL APPEARANCE.

Challenging jurisdiction,—see Pleading and Practice, 15.

GRAIN ELEVATORS.

Conversion—Warehouse Receipts—Varying Contracts by Testimony.

1. Warehouse receipts for grain stored in an elevator issued under the provisions of the Grain Elevator Act (Laws 1915, Chap. 93), constituted binding contracts between the bailor and bailee which could not be varied or contradicted by parol testimony, the effect of which was to show that the transaction amounted to a sale and not a bailment.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Warehousemen—Bailment—Agency—Sale by Elevator of Stored Grain to Itself Void.

2. An elevator company with which grain was stored for sale, having been the agent of the bailor, could not make a sale to itself.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Bailment—Sale—Subject Matter—Prerequisite.

3. Where grain stored in an elevator had been sold by defendant immediately upon its receipt, defendant's contention in an action for conversion that by transactions had between it and plaintiffs some time after the issuance of warehouse receipts a sale of the grain had been consummated, *held* without merit, since then, the grain having been sold theretofore, there was no subject matter with relation to which the parties could enter into a contract of sale.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Custom and Usages—When not Available as Defenses.

4. Since the Grain Elevator Act prescribes the mode in which the affairs of elevators shall be conducted, its provisions in this respect are the guide, and not usage or custom in conflict therewith.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Compromise and Settlement—Promise to Pay not Settlement in Absence of Payment.

5. One may not convert the property of another and escape liability by agreeing to pay a stated sum and then failing to make payment, where the transaction was intended to be a cash one.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Statutory Measure of Damages.

6. Where an action in conversion has been prosecuted with reasonable diligence, the plaintiff may exercise the option granted him by section 6071, Revised Codes, of demanding the highest market value of the property at any time between the conversion and the verdict, by giving notice, if he has not otherwise limited himself by his pleading, at any time before the submission of the cause for verdict or decision.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Statutory Measure of Damages Controlling.

7. Where plaintiff in an action in conversion brought himself within the rule requiring diligence in prosecuting the action (Rev. Codes, sec. 6071), the fact that the measure of damages recoverable under it may be inequitable and unjust cannot deprive him of his right to recover the highest market value of the property at any time between the conversion and the verdict, at plaintiff's option, which he might have obtained but for the wrongful act of defendant.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Bailment—Minimizing Damages.

8. A bailor of grain stored in a public elevator is under no legal obligation to purchase grain in the open market in order to minimize the damages for which the warehouseman may be liable in case of wrongful conversion of the grain.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Conversion—Date.

9. Ordinarily the date of demand and refusal is the date of conversion, but, if an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

Same—Suretyship—Unauthorized Withdrawal of Bondsman—Effect.

10. Release or withdrawal of a surety on a bond given under the Grain Elevator Act, without the consent of the bailor of wheat, is no defense in an action for damages for the wrongful conversion of the grain stored.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

GUARDIANS.

See, also, Probate Proceedings, 1-8.

Minors—Guardian Proper Person to Make Affidavit.

1. Where a minor is incompetent to make an affidavit, his guardian is the proper person to make it.—In re Stinger's Estate, 173.

HAIL INSURANCE.

See Insurance, 11.

HARMLESS ERROR.

Curtailement of cross-examination, when harmless,—see Criminal Law, 15.

Giving of instruction on abstract proposition of law,—see Appeal and Error, 9.

Technical violation of rule relative to cross-examination,—see Evidence, 1.

HEARSAY.

See Evidence, 2, 8.

HOMICIDE.

See Criminal Law, 1-9, 13-30.

HUSBAND AND WIFE.

Divorce—Dismissal of Action—Attorney's Fees—When not Recoverable from Husband.

1. An action against the husband for legal services rendered the wife in instituting divorce proceedings, which were dismissed by her soon after their commencement, did not lie under section 3677, Revised Codes, which provides that while a divorce action is pending the court or judge may require the husband to pay suit money to enable the wife to prosecute (or defend) the action, the power thus conferred being exclusive and ancillary to, and not independent of, the divorce action.—Grimstad v. Johnson, 18.

Same—Divorce not a "Necessary."

2. An action of the nature of the above is not maintainable under section 3724, Revised Codes, impliedly conferring authority upon the wife to charge her husband, for the value of articles necessary for her support, her want of funds to litigate a suit for divorce not being a "necessary" as that term is employed in that section.—Grimstad v. Johnson, 18.

Same—Duties and Obligations—Statutes Exclusive.

3. By the enactment of sections 3641-3689, Revised Codes, and sections 3724 and 3725, and others *in pari materia* with them, the subjects of divorce, separate maintenance, as well as the rights, duties and obligations of husband and wife were intended to be fully covered, and hence all rules theretofore in force are thereby supplanted.—Grimstad v. Johnson, 18.

INDIANS.

Contracts—Enforceability.

1. *Held*, that section 4087, United States Compiled Statutes, declaring invalid contracts with an Indian not a citizen of the United States unless approved by the secretary of the interior and the commissioner of Indian affairs, refers to contracts affecting Indian allotments, and therefore did not render void promissory notes signed by an Indian which did not involve allotment rights.—In re Stinger's Estate, 173.

May Make Valid Contracts.

2. Unless prohibited by statute, an Indian may make valid contracts. In re Stinger's Estate, 173.

Grazing Contracts—When not Subject to Review.

3. Under the Act of Congress approved February 28, 1891 (26 Stats. at Large, 795), tribal Indians are given primary authority to lease lands owned by them for grazing purposes, the determination of their council being conclusive upon the federal government in the absence of evidence of fraud or undue influence.—White Bear v. Barth, 322.

Same—Corrupt Use of Money—Invalidity—Public Policy.

4. A contract between an Indian and livestock men, under which the former agreed by the corrupt use of money to influence the members of his tribe toward preventing a certain person from receiving a lease of their lands for grazing purposes; to incite them to demanding the cancellation of other leases, without reference to the merits of the case and upon unverified statements of his employers; to prevent the cancellation of a lease to one of the latter in face of the fact that the government had just cause for canceling it, and to keep him on

the reservation in defiance of an order canceling his lease and directing his removal, *etc.*, was void as against public policy, it being immaterial that the resulting action by the Indians may not have led to injury or may have been for the best interest of the Indians.—*White Bear v. Barth*, 322.

Same—Personal Influence Over Indians—Invalidity—Public Policy.

5. A contract under which an Indian, who was a grandson of a former chief of his tribe and had been educated at Carlisle, who acted as interpreter for the Indians, was a regular attendant at their council meetings, prominent in tribal affairs and had great influence with them, being generally successful in having his views adopted even against pronounced opposition, was to exercise his personal influence with the Indians to obtain action favorable to his employers in the matter of leases of land for grazing, was void as against good morals and sound public policy.—*White Bear v. Barth*, 322.

INFANTS.

See Minors.

INFERENCES.

Sufficiency of pleading,—see Pleading and Practice, 9, 18.

INFORMATIONS.

Filing without preliminary examination,—see Criminal Law, 24.

Sale of intoxicating liquors—Preliminary examination of witnesses—Statute directory,—see Criminal Law, 12.

Surplusage,—see Criminal Law, 26.

Verification,—see Criminal Law, 10, 25.

When sufficient,—see Criminal Law, 11.

INJUNCTION.

Water right suit—Complaint—Insufficiency,—see Waters and Water Rights, 12.

INSTRUCTIONS.

Malicious Prosecution—Want of Probable Cause—Improper Instruction.

1. Refusal of an offered instruction that if plaintiff in an action for malicious prosecution was guilty of an offense different from the one charged against him, which was dismissed, his discharge will not show want of probable cause necessary to sustain his action, was proper as being too broad.—*Robinson v. Gordon*, 124.

Intoxicating Liquors—Purchase—Refusal of Instruction on Agency Proper, When.

2. Where defendant, on being approached by one desiring to purchase liquor, demanded and received pay therefor and thereupon by telephone instructed a third person to bring a bottle at once, who did so, handing it to the purchaser, an instruction offered by defendant on the theory that he had acted as agent for the purchaser in the transaction, *held* properly refused, an instruction on the question of agency being unwarranted by the evidence.—*State v. Paine*, 270.

Insurance—Proper Refusal of Instruction as Inapplicable.

3. An offered instruction that unless plaintiff had established the fact that he gave, and the company received, the proof of loss by fire required by the policy he could not recover, was properly refused as not applicable, the undisputed facts showing waiver of the requirement.—*Snell v. North British & Merc. Ins. Co.*, 547.

Commenting on Evidence—Error.

4. In a prosecution for selling intoxicating liquor, an instruction charging the jury that defendant was on trial for selling a bottle of whiskey "when the witnesses R. and V. [the state's principal witnesses] were present" at defendant's place of business, *held* prejudicially erroneous as commenting upon the evidence and invading the province of the jury, the fact of their presence having been disputed by defendant, thus presenting a question for the jury's determination. *State v. Harrington*, 373.

Abstract Rules of Law—When not Reversible Error.

5. The giving of an instruction embodying an abstract rule of law, though erroneous, is not ground for reversal if sufficient qualification and explanation thereof is found in other instructions so that when read together and as a whole it appears that the issues were fully and fairly submitted to the jury.—*Hunt v. Van*, 395.

Inapplicability to Facts—Error.

6. An instruction based on a counterclaim wholly unsupported by the evidence was inapplicable to the facts and therefore erroneous. *Montana Auto etc. Co. v. Kearney*, 435.

Automobiles—Master and Servant—Assuming Negligence of Driver—Liability of Master.

7. In an action for damages to plaintiff's automobile in a collision with defendant company's taxicab, an instruction based on the admission that its driver's acts were within the scope of his employment, that the company was liable for his negligent acts, *held* not erroneous as assuming negligence on the part of the driver, especially where in other instructions the extent of defendant's responsibility was made clear.—*Rohan v. Sherman & Reed*, 519.

Ambiguity in Particular Instruction—When not Reversible Error.

8. Where the charge to the jury as a whole leaves no doubt as to the correct principles of law applicable, ambiguity in a particular instruction given is not ground for reversal.—*Bohan v. Sherman & Reed*, 519.

INSURANCE.

Accident Insurance—Temporary Change of Occupation—Increase of Hazard—Extent of Insurer's Liability.

1. Where, at the time the insured applied for and was issued an accident insurance policy, he gave his occupation as proprietor of and meat-cutter in a butcher-shop, classified as less hazardous than that of tender of livestock in transit, the contract providing that in case he was injured after change of occupation to a more hazardous one or in doing any act or thing pertaining to any occupation classified as more hazardous, the company would pay only such portion of the indemnity as the premium would have purchased for the more hazardous occupation, and he was injured while temporarily acting as livestock tender and while in the act of watching trainmen repair a break in the locomotive, the insurer was liable only for the smaller amount provided for the occupation of tender of livestock in transit. *Ebeling v. Bankers' Casualty Co.*, 58.

Same—Change of Occupation—What Constitutes.

2. From the time the shipment of livestock was started on its journey until it reached its destination, the cattle composing it were in transit and the insured, whose regular occupation was proprietor of a butcher-shop and meat-cutter, but who temporarily acted as tender, was a caretaker or tender in transit.—*Ebeling v. Bankers' Casualty Co.*, 58.

Life Insurance—Application—Fraudulent Representations—Concealment of Prior Medical Treatment—Policy Void.

3. In his application for a life insurance policy which provided, among other things, that the statements of the insured, in the absence of fraud, should be deemed representations and not warranties, the applicant represented that the only illness or disease he had had since childhood was a slight cold, and that he had consulted, or been treated by, only one physician for five years last past. The evidence showed that four months before making these statements on his medical examination he had been treated by two physicians and was present at a consultation respecting his case held between the two and a third, that the treatment was not for a cold but for a serious ulcer of the throat of syphilitic or tubercular nature. Insured died of tubercular laryngitis some four months after issuance of the policy. *Held*, that the representations, accepted and acted upon as true by defendant to its prejudice, were as to material facts affecting the risk, intended to mislead and therefore fraudulent, justifying the insurer in avoiding the policy.—*Williams v. Mutual Life Ins. Co.*, 66.

Fire Insurance—Notice of Loss—Complaint—Inferences—Sufficiency.

4. In an action on a fire insurance policy which among other things provided that loss should not become payable until sixty days after notice of loss had been received by defendant company, failure of the complaint to allege directly that sixty days had elapsed after service of notice and before commencement of action did not render the pleading insufficient where, by reference to the record, it appeared affirmatively that the complaint was filed sixty-five days after service of notice.—*Smith v. Franklin Fire Ins. Co.*, 441.

Same—Notice and Proof of Loss—Conditions Precedent to Recovery.

5. While proof of loss required by a fire insurance policy may, under certain circumstances, serve the purpose of notice of loss also required, mere notice does not ordinarily supply the place of formal proof, the performance of each of the acts being a condition precedent to the right of the insured to recover in the absence of waiver.—*Smith v. Franklin Fire Ins. Co.*, 441.

Same—Liability—Lapse of Sixty Days After Proof of Loss—Complaint.

6. The complaint in an action on a fire insurance policy must allege affirmatively that the sixty-day period provided for therein before the loss became payable had expired before commencement of the action. *Smith v. Franklin Fire Ins. Co.*, 441.

Same—Conditions Precedent—Performance—General Statutory Allegation of Performance Insufficient.

7. The lapse of sixty days mentioned above, not being a condition precedent which plaintiff could perform before commencing suit, her general allegation, permissible under section 6572, Revised Codes, that she had performed all conditions precedent to be performed by her under the contract, did not supply the necessary allegation that the period had elapsed before filing complaint.—*Smith v. Franklin Fire Ins. Co.*, 441.

Same—Ascertainment of Loss—Complaint—Burden of Insurer.

8. *Semble*: It would seem that where a fire insurance policy provides that loss shall not become payable until sixty days after ascertainment or estimate of its amount by the insured and the insurance company, or, if they differ, by a board of appraisers, the burden of the disclosing that that time had not elapsed before commencement of action is upon defendant company and not upon insured.—*Smith v. Franklin Fire Ins. Co.*, 441.

Same—Ascertainment of Loss—Complaint—Allegation of Demand and Refusal Sufficient.

9. *Held*, that an allegation that plaintiff had demanded adjustment of her claim under a fire insurance policy, but that insurer had refused to participate in an ascertainment of the loss was sufficient to meet the requirement that action should not be commenced until sixty days after ascertainment of the loss by one of the methods prescribed in the policy.—*Smith v. Franklin Fire Ins. Co.*, 441.

“Broker”—Definition.

10. An insurance broker, as distinguished from an insurance agent, is one who acts as a middleman between the assured and the insurer, and who solicits insurance from the public under no employment from any special company, and, upon securing an order, either places the insurance with a company selected by the assured, or, in the absence of such selection, with a company selected by the broker. *Gay v. Lavina State Bank*, 449.

Hail Insurance—Broker's Failure to Procure—Liability for Loss.

11. Where a bank acting as an insurance broker, negligently failed to forward a farmer's application for hail insurance to the insurer and plaintiff's crop was destroyed, it was liable to the extent of the loss which would have fallen upon the company had the insurance been effected as contemplated.—*Gay v. Lavina State Bank*, 449.

Life Insurance—Application—False Answers—Breach of Warranties—Policy Void.

12. Where the answers to questions in an application for life insurance were by the policy made warranties, and the applicant in reply thereto stated that she had not been treated by or consulted a physician within the past five years and that she had not undergone an operation for appendicitis, whereas the evidence showed that she had been treated by a physician on many occasions within that time and had been operated on for appendicitis, the policy was void, and the trial court erred in refusing to grant defendant's motion for a directed verdict.—*Beckman v. National Council of Knights & Ladies of Security*, 512.

Fire Insurance—Proof of Loss—Waiver.

13. Where defendant insurance company's adjuster co-operated with the insured in making up a list in detail of the latter's property destroyed by fire and the amount of the loss, and in effect stated to him that the only thing left to be determined was the amount that should be paid, he gave the insured cause to believe that nothing further was required of him, amounting to a waiver of the requirement of the policy making it incumbent upon the insured to furnish proof of loss within a given time.—*Snell v. North British & Merc. Ins. Co.*, 547.

Same—Insufficient Proof of Loss—Retention Without Objection—Waiver.

14. Receipt and retention by the insurer, without objection, of a paper which insured believed to be such proof of loss as was required by a fire insurance policy, and failure to demand further proof, constituted a waiver of the right of the insurer to object thereto on the ground that it did not satisfy the requirements of the policy.—*Snell v. North British & Merc. Ins. Co.*, 547.

Same—Insufficiency of Proof of Loss—What may Constitute Waiver.

15. *Held*, that by advising its local agent upon inquiry as to the status of plaintiff's claim under a fire insurance policy that the matter of the adjustment of the loss was in the hands of its adjuster, without stating that proof of loss was unsatisfactory, the insurer

waived any defect or insufficiency in the proof of loss furnished.—*Snell v. North British & Merc. Ins. Co.*, 547.

Same—Policy Requirements—Waiver must be Pleaded.

16. Where plaintiff in an action on an insurance policy relies upon a waiver of material provisions thereof, he must plead the facts constituting it, an allegation of full performance of all its conditions not being established by proof of waiver alone.—*Snell v. North British & Merc. Ins. Co.*, 547.

Same—Instruction—Proper Refusal.

17. An offered instruction that unless plaintiff had established the fact that he gave, and the company received, the proof of loss by fire required by the policy he could not recover, was properly refused as not applicable, the undisputed facts showing waiver of the requirement.—*Snell v. North British & Merc. Ins. Co.*, 547.

Same—Retention of Premium—Policy Requirements—What not Waiver.

18. Defendant insurer not having denied the contract of insurance and its obligations thereunder, retention of a premium due on the policy paid some months after a destruction of plaintiff's property by fire could not be construed as a waiver of any of the provisions of the policy, and admission in evidence of such payment was erroneous, but harmless.—*Snell v. North British & Merc. Ins. Co.*, 547.

INTOXICATING LIQUORS.

Wrongful Seizure—Void Search-warrant—Return of Liquors.

1. Judgment declaring a quantity of whiskey seized under a void search-warrant forfeited and ordering it destroyed, reversed upon authority of *Samlin v. District Court*, 59 Mont. 600, 198 Pac. 362, with directions to the trial court to dismiss the proceeding instituted under the Prohibition Enforcement Act (Chap. 143, Laws 1917), and order the sheriff to return to the claimant the articles seized.—*State ex rel. Green v. Wright*, 115; *State ex rel. Goodwin v. Dishmon*, 117.

Same—New Trial—Motion Unauthorized.

2. In a search-warrant proceeding instituted under the provisions of the Prohibition Enforcement Act, a motion for a new trial is unauthorized.—*State ex rel. Green v. Wright*, 115; *State ex rel. Goodwin v. Dishmon*, 117.

Sale—Filing Information—Preliminary Examination of Witnesses—Statute Directory.

3. Failure of the county attorney to conduct the preliminary examination of witnesses authorized by section 12 of Chapter 143, Laws of 1917, before filing an information by leave of court charging a violation of the liquor law, is not a ground for setting it aside, the section being directory only, and designed to extend the scope of the prosecuting officer's authority to secure evidence, not to advise the defendant of the evidence he thus obtains.—*State v. Paine*, 270.

Same—Purchase—Refusal of Instruction on Agency Proper, When.

4. Where defendant, on being approached by one desiring to purchase liquor, demanded and received pay therefor and thereupon by telephone instructed a third person to bring a bottle at once, who did so, handing it to the purchaser, an instruction offered by defendant on the theory that he had acted as agent for the purchaser in the transaction, *held* properly refused, an instruction on the question of agency being unwarranted by the evidence.—*State v. Paine*, 270.

Same—Instructions—Commenting on Evidence.

5. In a prosecution for selling intoxicating liquor, an instruction charging the jury that defendant was on trial for selling a bottle

of whiskey "when the witnesses R. and V [the state's principal witnesses] were present" at defendant's place of business, *held* prejudicially erroneous as commenting upon the evidence and invading the province of the jury, the fact of their presence having been disputed by defendant, thus presenting a question for the jury's determination. *State v. Harrington*, 373.

ISSUES.

Amendment of complaint before retrial—Identity of issues—Deceased witness—Admissibility of evidence had at former trial,—see Evidence, 3.

JUDGMENTS.

Against sureties on bond in claim and delivery action not made parties error,—see Claim and Delivery, 2.

Pleading judgment in abbreviated form,—see Malicious Prosecution, 1.

Judgment by Default—Counterclaim—Failure to Reply.

1. A default may be entered for failure of plaintiff to reply to a counterclaim.—*Munger v. Nelson*, 104.

Same.

2. Under section 6560, Revised Codes, a reply to a counterclaim must be filed within twenty days after service and filing of the answer; hence where a reply was not filed until nineteen months after the expiration of the twenty-day period and fourteen months after default had been entered, the court did not err in disregarding the belated pleading on motion for judgment on the counterclaim.—*Munger v. Nelson*, 104.

"Default"—Failure to Appear—Effect of Entry of Default.

3. Entry of the "default" of a party for failure to appear at the trial of the cause in legal effect amounts to no more than a declaration that he was not personally present.—*Munger v. Nelson*, 104.

Default Judgments—Setting Aside—Insufficiency of Showing.

4. Affidavits of counsel for defendant in support of a motion to vacate a default judgment entered some two years and six months after the original complaint was served upon her, stating that defendant resided on a farm in California and that it was impossible to get mail to and from her without considerable loss of time; that because of her age it required much time for her to recall matters connected with the litigation, and that though numerous letters had been written to her, counsel were unable to obtain a complete statement of the case from her until after the time for answering had expired, *held* insufficient to warrant reversal of the order denying the motion nothing appearing that counsel made any effort to ascertain the facts relating to the defense until demurrer to the fourth amended complaint had been overruled, two months before entry of default, and counsel having made no effort to obtain any extension of time within which to file an answer.—*Smallhorn v. Freeman*, 137.

Judgment *in Personam*—Summons—Constructive Service Insufficient.

5. A judgment *in personam* cannot be rendered upon constructive service of summons alone.—*Hinderager v. MacGinniss*, 312.

Same.

6. Where an attachment is issued in an action not falling within the provision of section 6656, Revised Codes, and service of summons is made by publication only, the property of defendant is not brought

within the jurisdiction and control of the court, and a judgment by default, being one *in personam*, is void.—Hinderager v. MacGinniss, 312.

Default Judgment—Objection to Jurisdiction—General Appearance—Waiver.

7. Where defendant in an action in which an attachment had been issued moved to vacate a default judgment on the ground of want of jurisdiction because of invalid service of summons, and on the further ground of excusable neglect, at the same time asking for leave to file his answer, his appearance was general, resulting in a waiver of his objection to jurisdiction.—Hinderager v. MacGinniss, 312; Smith v. Franklin Fire Ins. Co., 441.

Same—Setting Aside—Inexcusable Delay.

8. Where defendant knew of the pendency of an action against him five months before judgment by default was entered but took no steps looking to a defense on the merits until seven months after its entry, when he moved to set it aside, asking leave to file his answer, and thereafter for three years more neglected to bring his motion on for hearing, denial of the motion on the ground of inexcusable delay was proper.—Hinderager v. MacGinniss, 312.

Void Judgment Always Void.

9. A judgment, void when rendered, will always remain void.—Lamont v. Vinger, 530.

Judgment Depends upon Jurisdiction Before It is Rendered.

10. The validity of every judgment depends upon the jurisdiction of the court before it is rendered, and not upon what may occur subsequently.—Lamont v. Vinger, 530.

JUDICIAL NOTICE.

Statutory laws of other states,—see Evidence, 7.

JURISDICTION.

See, also, Collateral Attack.

Challenging jurisdiction over person,—see Pleading and Practice, 15.

In naturalization proceedings,—see Aliens, 1.

Objection to—Defective summons,—see Waiver, 2.

Probate courts,—see Probate Proceedings, 3–8.

Appeal Removes Cause and Judgment to Supreme Court.

1. An appeal from a judgment automatically removes the action as well as the judgment to the supreme court, thereby divesting the trial court of further jurisdiction over either.—State ex rel. O'Grady v. District Court, 346.

Same—Jurisdiction in Trial Court by Stipulation Ineffectual.

2. Where the district court is deprived of jurisdiction of a cause by appeal, the parties cannot by stipulation reinvest such court with jurisdiction.—State ex rel. O'Grady v. District Court, 346.

Appeal—Abandonment Does not Reinvest Trial Court With Jurisdiction.

3. A board of county commissioners perfected an appeal from an order of the district court commanding it to pay certain claims. Without dismissing it in the supreme court, it subsequently advised the trial court that it would abandon its appeal. That court thereupon amended the judgment in certain respects and ordered the board to pay the claims. The county clerk instead of delivering the war-

rants to the claimants as ordered, lodged them with the county treasurer and he refused to pay or register them. They were adjudged guilty of contempt. *Held*, on *certiorari*, that the district court acted in excess of jurisdiction in amending its judgment, and that therefore its order directing payment of the claims was void.—State ex rel. O'Grady v. District Court, 346.

Actions in rem—Process.

4. Unless a proceeding is strictly *in rem* a valid judgment cannot be rendered affecting the rights of third parties if they were not served with process or appeared and had an opportunity to be heard. Lamont v. Vinger, 530.

Real Property of Intestate—Order of Sale—Proceeding *Quasi in Rem*—Process.

5. *Held*, that the matter of procuring an order of sale of real property belonging to the estate of an intestate is one *quasi in rem* and not strictly *in rem*, and that therefore failure to make an order to show cause and to serve it substantially in the manner required by the Codes rendered the sale void.—Lamont v. Vinger, 530.

Same—Order of Sale of Real Property—Power of Court Special.

6. The authority of the probate court to order a sale of real property of an intestate is not included in its general jurisdiction over the administration but is special and limited and can be exercised only in the manner prescribed by the statute.—Lamont v. Vinger, 530.

Due Process of Law—Curative Statutes—Limit of Curative Power.

7. Under the constitutional provision that no one shall be deprived of property without due process of law, a curative Act cannot go to the extent of supplying jurisdiction where there was none in the first instance because of lack of notice and an opportunity to be heard.—Lamont v. Vinger, 530.

Administrators' Sales—Void Order not Validated by Curative Statute.

8. *Held*, under the above rule (7) that Chapter 4, Laws of 1915, providing that irregularities in obtaining an order of court for the sale of real property of an intestate shall not invalidate the sale was ineffectual to cure the fatal omission of the court to take the necessary steps to give it jurisdiction to make the order.—Lamont v. Vinger, 530.

Absence of Process—Waiver—Collateral Attack.

9. A party not served with process who does not voluntarily appear and contest the action upon its merits does not waive the question of jurisdiction by remaining passive, but may thereafter attack the judgment collaterally.—Lamont v. Vinger, 530.

Validity of Judgment—Upon What Dependent.

10. The validity of every judgment depends upon the jurisdiction of the court before it is rendered, and not upon what may occur subsequently.—Lamont v. Vinger, 530.

JURY.

Alleged alien on jury in criminal case,—see Criminal Law, 21.

Jury trial—Extent of right of defendant charged with crime,—see Criminal Law, 22.

Selection of, in criminal cause—*Voir dire* examination—Opinion founded on newspaper reports—Contradictory answers—Discretion,—see Criminal Law, 13, 14.

Special jury—Manner of drawing—When defendant may not complain,—see Criminal Law, 23.

JUSTICES OF THE PEACE.

Criminal law—Preliminary examination—Cash bail—What equivalent to dismissal of charge—Liability of justice for return of bail,—see Bail, 1-3.

LACHES.

Guardians—Claims—Subrogation.

1. Where a guardian had made full and complete settlement with his wards, delays in arriving at a settlement were of no concern to an estate in a proceeding whereby he sought to obtain an order directing the administrator to pay to him allowed and approved claims, to the rights of his wards in which he alleged he had become subrogated.—In re Stinger's Estate, 173.

Same—Claims—Payment.

2. While an owner of a claim against an estate may take action to expedite payment where unreasonable delay has occurred, it is not obligatory upon him to do so; he may assume that claims will be paid in due course of administration when the estate is in condition to pay, without laying himself open to a charge of laches.—In re Stinger's Estate, 173.

LIBEL AND SLANDER.

Libel *Per Se*—Newspaper Article—Construction of Language.

1. Words used in an alleged libelous newspaper article must be susceptible of but one meaning to constitute libel *per se*, and the libelous matter may not be segregated from other parts of it and construed alone.—Schaffroth v. The Tribune, 14.

Same—Complaint—Insufficiency.

2. Under the above rule, *held* that the complaint in an action for libel which alleged that in the heading of an article was published the fact that F. S. (the plaintiff) had admitted a theft, and that in the body of it appeared the statement that one G. S. had done so, and was awaiting sentence for grand larceny, did not state a cause of action.—Schaffroth v. The Tribune, 14.

LIFE INSURANCE.

See Insurance, 3, 12.

LIMITATIONS OF ACTIONS.

See, also, Promissory Notes, 9.

Claim and Delivery—Livestock—Estrays.

1. Section 6449, subdivision 4, providing that an action for fraud or mistake must be brought within two years after discovery of the facts, applies only to actions for fraud or mistake within the common acceptation of those terms, and not to an action in claim and delivery where defendant honestly and in good faith bought an estray from one wrongfully claiming to be the owner of the animal. Bennett v. Meeker, 307.

Same—Estrays—Ignorance of Right of Action.

2. In an action in claim and delivery to recover possession of a cow picked up by defendant and later in good faith purchased from one claiming to be but who was not the owner, defendant not having done anything to prevent the true owner from ascertaining the whereabouts of the animal and learning of his right of action, the fact that plaintiff was ignorant of the circumstances which would have enabled him to bring timely suit did not entitle him to sue after

the limitation of two years fixed by subdivision 3 of section 6449, Revised Codes, had run.—*Bennett v. Meeker*, 307.

Recovery of Realty by Heir.

3. An action to recover real property sold by an administrator under an alleged void order of sale, brought after the limitation prescribed by section 7596, Revised Codes, within which an heir must commence his action had expired, but within the three-year period after reaching his majority (sec. 7597), was not barred.—*Lamont v. Vinger*, 530.

LIVESTOCK.

Estrays—Duty of finder—Right of action—Statute of limitations,—see Claim and Delivery, 3-5.

Injury at station grounds,—see Railroads, 1-5.

Shipments—Published tariffs part of contract—Oral negotiations merged in contract—Authority of attendant to change contract—Evidence—Insufficiency,—see Railroads, 8-11.

MALICIOUS PROSECUTION.

Dismissal of Criminal Charge—Judgment—Pleading—Sufficiency.

1. Allegation of the complaint in an action for malicious prosecution for grand larceny in a justice's court, to the effect that the justice dismissed the charge "in due manner, in due course of law," held sufficient to show determination of the prosecution in plaintiff's favor, and not open to the objection that it was fatally defective because not in conformity with section 6571, Revised Codes, providing that where a judgment or other determination of a court is pleaded it may be stated as having been "duly given or made," the statute applying only where the pleader chooses to allege the jurisdiction of the court in the abbreviated form in a cause where the right of action depends upon the validity of the judgment or order pleaded.—*Robinson v. Gordon*, 124.

Same—Want of Probable Cause—Improper Instruction.

2. Refusal of an offered instruction that if plaintiff in an action for malicious prosecution was guilty of an offense different from the one charged against him, which was dismissed, his discharge will not show want of probable cause necessary to sustain his action, was proper as being too broad.—*Robinson v. Gordon*, 124.

MANDAMUS.

When not proper remedy,—see Counties, 5.

Lies, When.

1. The writ of mandate lies only to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station, and therefore will not issue to do a thing beyond the power of duty of the person sought to be compelled.—*State ex rel. Judith Basin County v. Poland*, 600.

MASTER AND SERVANT.

See Personal Injuries.

MECHANICS' LIENS.

Title to Land not in Lienee—Extent of Lien.

1. Where title to the land on which a building was constructed with material furnished by plaintiff is not in the lienee, the lien extends

to the building only, and in such a case any error or mistake in the description of the land in the notice of lien does not affect the validity of the lien if the "property"; i. e., the building, can be identified. (Rev. Codes, sec. 7291.)—*Midland Coal & Lumber Co. v. Ferguson*, 402.

Description of Land—Degree of Correctness Required.

2. A mechanic or materialman is not required to employ a surveyor to locate the building sought to be charged with a lien in order to enable him to obtain a correct description of the land on which it is situated, the description of the land being resorted to only as a means for identifying the building.—*Midland Coal & Lumber Co. v. Ferguson*, 402.

Erroneous Description of Building—When Nonprejudicial.

3. Where the description of the building sought to be charged with a materialman's lien is sufficient to enable a person familiar with the locality to point it out as the only one corresponding with the description in the lien, it is sufficient, and if by rejecting what is erroneous in the description enough remains to identify the particular property sought to be charged, the lien will be upheld.—*Midland Coal & Lumber Co. v. Ferguson*, 402.

Erroneous Description of Land—When not Fatal to Lien.

4. Under the above rules, *held*, that where a lienor in its lien notice had described the land for a building on which it had furnished materials as situate on the NE. $\frac{1}{4}$, whereas in fact it was on the NW. $\frac{1}{4}$ of a certain section, but so close to the line between the two forties that it would have required the services of a surveyor to ascertain its exact location, the error did not vitiate the lien, in view of the fact that the building was the only one of its kind in the vicinity and easily identified.—*Midland Coal & Lumber Co. v. Ferguson*, 402.

Foreclosure Sale—Error in Sheriff's Return in Designation of Purchaser—Effect.

5. An error made by a sheriff in his return of a lien foreclosure sale in his designation of the purchaser cannot work to the prejudice of the latter.—*Midland Coal & Lumber Co. v. Ferguson*, 402.

MINORS.

Affidavits by,—see Guardians, 1.

Employment of—Complaint—Insufficiency,—see Pleading and Practice, 5.

MINUTES OF COURT.

Presumption of correctness,—see Continuance, 1.

MOTIVE.

Evidence—Admissibility,—see Criminal Law, 18.

MURDER.

See Criminal Law, 1-9, 13-30.

NATURALIZATION OF ALIENS.

See Aliens.

NEGLIGENCE.

See Personal Injuries; Railroads.

NEGOTIABLE INSTRUMENTS.

See Promissory Notes.

NEW COUNTIES.

Adjustment of indebtedness,—see Counties, 1-6.

NEW TRIAL.

New trial order made by district judge after expiration of terms,—see District Courts, 1.

Intoxicating Liquors—Seizures—Motion for New Trial Unauthorized.

1. In a search-warrant proceeding instituted under the provisions of the Prohibition Enforcement Act, a motion for a new trial is unauthorized.—State ex rel. Green v. Wright, 115; State ex rel. Goodwin v. Dishmon, 117.

Lies, When.

2. Under section 6794, Revised Codes, a new trial—a re-examination of the facts—lies where an error of law has been committed by reason of misapplication of law to the facts.—In re Stinger's Estate, 173.

Probate Proceedings—New Trial Lies When.

3. Where formal pleadings authorized or required by the statute in a probate proceeding, no matter how denominated, present issues of fact, a new trial lies even though the proceeding was disposed of solely upon a question of law.—In re Stinger's Estate, 173.

Same—Pleadings Presenting Question of Fact—Decision of Question of Law—Motion for New Trial Proper.

4. *Held*, under the above rules, that where a guardian petitioned the court in a probate proceeding for an order directing an administrator to pay certain claims allowed against the estate as due his wards to himself personally, on the ground that he had become subrogated to their rights, to which petition objections in the nature of answers were filed, petitioner filing replies, raising issues of fact, the court denying the petition for lack of jurisdiction to determine the equitable claim of subrogation, a motion for new trial lay.—In re Stinger's Estate, 173.

Personal Injuries—Excessive Verdict.

5. Plaintiff, a section-hand, at the time of the accident was fifty-six years of age, earning twenty-two and one-half cents per hour. His own physician declined to state that he was permanently injured; when he left the hospital there were no visible signs of injury upon his body; X-ray plates made of the injured parts showed no permanent injury. At the time of the trial he was able to conduct a substantial restaurant business. *Held*, that a verdict for \$10,000 was so excessive as to require a new trial.—Wegge v. Great Northern Railway Co., 377.

Criminal Law—Newly Discovered Evidence—Lack of Diligence.

6. Where during the trial counsel for defendant cross-examined witnesses for the state with reference to the question whether certain marks claimed by the state to have been made by bullets were not made by blasting a beaver dam, an affidavit, on motion for new trial on the ground of newly discovered evidence, that the dam had been blasted shortly after the shooting occurred disclosed lack of diligence to discover the facts and was insufficient to warrant a retrial.—State v. Fountain, 461.

OFFICERS.**NONSUIT.**

When proper in personal injury action,—see Personal Injuries, 2, 6.

How evidence viewed on appeal,—see Appeal and Error, 1.

When not to be Granted.

1. Nonsuit should not be granted unless it appears as a matter of law that recovery cannot be had in any view which can reasonably be drawn from the facts which the evidence tends to establish.—Larson v. Marcy, 1.

Failure to Stand upon Motion—Waiver.

2. Where, instead of standing upon his motion for nonsuit made at the close of plaintiff's case on the ground of failure of proof, defendant in his cross-examination of plaintiff on rebuttal supplied the defect, he was in no position to predicate error on the refusal of the motion.—Slack v. Brown, 99.

Appeal and Error—Record on Appeal.

3. Where a motion for nonsuit and the grounds therefor were not incorporated in the bill of exceptions or the judgment-roll, except as shown in copies of journal entries improperly in the judgment-roll, alleged error in sustaining the motion was not reviewable on appeal. Montana Auto & Garage Co. v. Kearney, 435.

NOTARIES PUBLIC.

Absence of seal from verification,—see Probate Proceedings, 2.

NOTICE.

Administrator's Sale—Notice Indispensable.

1. In the absence of waiver, notice to the heirs of an intestate of a contemplated sale of real property is indispensable.—Lamont v. Vinger, 530.

NOVATION.

See Promissory Notes, 2.

OBITER DICTA.

See Appeal and Error, 3.

OFFICERS.

Term of office of district judges,—see District Courts, 1.

Authority Ceases upon Expiration of Term.

1. When the duration of the term of office is specified in the statute, and an officer is elected to serve out the term, his power and authority thereupon *ipso facto* cease, unless he is authorized by some specific provision of organic law to hold over.—Marcellus v. Wright, 274.

Terms—Statutes—Construction.

2. If the language of a statute specifying the term of office of an official is ambiguous, the interpretation which limits the terms to the shortest time should be adopted.—Marcellus v. Wright, 274.

Term of Office—"Until"—Definition.

3. The word "until" within statutes fixing terms of office, is a restrictive word, and is of limitation; its office being to fix some point of time upon the arrival of which what precedes will cease to exist.—Marcellus v. Wright, 274.

De Facto and De Jure.

4. Where an officer *de jure* is in possession, no other person can be an officer *de facto*, with respect to that office, so as to render an act of the latter officially valid.—*Marcellus v. Wright*, 274.

Removal—Proceedings Criminal in Nature—District Judges—Disqualification by Affidavit Under Fair Trial Law not Permitted.

5. *Held*, that proceedings for the removal of civil officers under section 9006, Revised Codes, as amended by Chapter 25, Laws of 1917, are criminal in their nature, and that therefore neither party has the right to file an affidavit disqualifying a district judge for imputed bias or prejudice under section 6315, Revised Codes, as amended by Chapter 114, Laws of 1909. (MR. JUSTICE HOLLOWAY dissenting.)—*State ex rel. Houston v. District Court*, 558.

OPTIONS.

See Contracts, 4.

PARTIES.

Judgment against sureties on bond in claim and delivery not made parties to action unwarranted,—see Claim and Delivery, 2.

Proper party defendant in action against railroad while under control of Director-general of railroads—Substitution of proper party by supreme court unauthorized,—see Railroads, 6, 7.

PAYMENT.

Involuntary payment—Extortion—Complaint—Insufficiency,—see Pleading and Practice, 14.

Promise to pay not payment,—see Grain Elevators, 5.

PERSONAL INJURIES.

Master and Servant—Assumption of Risk—Defense Lies, When.

1. The defense of assumption of risk is available to an employer, where, though plaintiff's injury resulted from a hazard brought about by the failure of defendant to discharge his primary duty to provide a reasonably safe place in which or reasonably safe appliances with which to work, plaintiff was aware of the thus increased hazard, or the hazard was so obvious that an ordinarily prudent man placed in the same circumstances would have known and appreciated it, but continued in the employment without complaint or protest.—*Cameron v. Judith Mercantile & Cattle Co.*, 118.

Same—To Farm Laborer—Unguarded Circular Saw—Safe Place to Work—Assumption of Risk—When Nonsuit Proper.

2. *Held*, under the above rule, that where plaintiff, a farm-hand aged twenty-six years, who had been directed by the foreman to assist his coemployees in cutting stovewood with a circular saw which was located in the open the same as it had been during the three years of his employment and was unprovided with a guard, and with the operation of which he was thoroughly familiar, voluntarily assumed to act as sawyer and in its operation slipped on icy ground covered with newly fallen snow and was injured by coming in contact with the revolving saw, he assumed the risk and judgment of nonsuit was proper.—*Cameron v. Judith Mercantile & Cattle Co.*, 118.

Same—Employment of Minor—Complaint—Insufficiency.

3. The complaint in an action by a minor against a railway company to recover damages for personal injuries under section 1746, Revised

Codes, making it negligence *per se* for an employer to hire a child under sixteen years of age, must allege that defendant employed plaintiff knowing him to have been under that age.—Fallon v. Chicago, Mil. & St. P. Ry. Co., 130.

Same—Complaint—Insufficiency—Amendment—Denial, When not Error.

4. Refusal to permit plaintiff to amend his complaint at the close of his case was not error where the contemplated amendment, if permitted, would not have rendered the pleading sufficient.—Fallon v. Chicago, Mil. & St. P. Ry. Co., 130.

Same—Negligence—Complaint—Knowledge of Defect—Insufficiency.

5. Complaint charging negligence on the part of defendant railway company in permitting an apron iron, with its convex side upward, to lie between the tracks near its roundhouse and shops where plaintiff, a call-boy, stepped upon it in the dark, causing him to fall and be injured, *held* insufficient for failure to allege when defendant actually learned, or had opportunity to learn, of its presence at the place of the accident.—Fallon v. Chicago, Mil. & St. P. Ry. Co., 130.

Same—Nonsuit—When Proper.

6. Testimony of plaintiff examined and *held* insufficient to make out a *prima facie* case of negligence.—Fallon v. Chicago, Mil. & St. P. Ry. Co., 130.

Same—Respondeat Superior—Automobiles—Injury to Pedestrian—Scope of Employment.

7. Where an automobile dealer's chauffeur, demonstrating a car for his employer, acceded to the request of the prospective buyer and permitted the buyer's daughter to drive the car, accompanied by the chauffeur, who lost control, the chauffeur, who then took hold of the wheel and steered the car upon the sidewalk, striking a pedestrian, was acting within the scope of his employment, rendering the employer liable for the injuries suffered by the pedestrian.—Hoffman v. Roehl, 290.

Same—Respondeat Superior—Scope of Employment.

8. Where an employer is sought to be held liable for personal injuries caused by the negligence of his employee under the doctrine of *respondeat superior*, the decisive question is whether at the time of the accident the latter was acting within the scope of his employment; if so, the employer is responsible.—Hoffman v. Roehl, 290.

Same—Scope of Employment—When Question of Fact—When of Law.

9. Generally speaking, the question whether an employee was acting within the scope of his employment when he caused injury to another is one of fact; where, however, the injury was caused while he was doing something which had no connection with his duties, the question becomes one of law.—Hoffman v. Roehl, 290.

Railroads While Under Control of Director-general of Railroads—Proper Party Defendant.

10. In an action against a railway company to recover damages for personal injuries suffered during the time defendant company's road was being operated by the director-general of railroads, the proper party defendant was the director-general and not the company.—Bryson v. Great Northern Ry. Co., 351.

Same—Judgment Against Improper Party Defendant—Substitution of Proper Party by Supreme Court Unauthorized.

11. Where, in an action against a railway company for damages for the death of a locomotive engineer in a collision at a time when defendant's road was in the possession and control of the director-general of railroads under the Federal Control Act, the defendant company ineffectually endeavored to have the director-general sub-

stituted as the proper party defendant, the supreme court, on appeal by the company from a judgment in favor of plaintiff, is without jurisdiction, on motion of plaintiff, to substitute the director-general for the company and affirm the judgment, or order substitution and a new trial, but will reverse the judgment and order dismissal of the complaint.—*Bryson v. Great Northern Ry. Co.*, 351.

Same—Railroads—Injuries in Course of Employment—Conflicting Evidence—Verdict Conclusive.

12. The question whether, when plaintiff, a section-hand, was injured by a collision while resting in a caboose standing upon the main line after the dinner hour and waiting to be transported to work, he was or was not acting within the scope of his employment was for the jury's determination where the evidence relating thereto was not conclusive either way.—*Wegge v. Great Northern Ry. Co.*, 377.

Same—Scope of Employment—Conductor Acting as Engineer—Liability of Master.

13. *Held*, that a conductor of a work train was not only acting in furtherance of the operations intrusted to him, but also within the scope of his authority when, in the temporary absence of the engineer, he assumed charge of the locomotive and in his endeavor to switch a caboose from the main line, where it was a menace to life and limb on account of passing trains, to a side-track and in doing so caused a collision with the caboose injuring plaintiff.—*Wegge v. Great Northern Ry. Co.*, 377.

Same—Excessive Verdict—New Trial.

14. Plaintiff, a section-hand, at the time of the accident was fifty-six years of age, earning twenty-two and one-half cents per hour. His own physician declined to state that he was permanently injured; when he left the hospital there were no visible signs of injury upon his body; X-ray plates made of the injured parts showed no permanent injury. At the time of the trial he was able to conduct a substantial restaurant business. *Held*, that a verdict for \$10,000 was so excessive as to warrant the granting of a new trial.—*Wegge v. Great Northern Ry. Co.*, 377.

Automobiles—Repairs—Storage—Counterclaims—Personal Injuries—Negligence—Causal Connection—Evidence—Insufficiency.

15. In an action by the owner of a garage to recover for repairs on and storage of an automobile, where defendant's counterclaims based on damages to the automobile because of negligent repairs and consequent personal injuries to himself were not supported by his evidence showing negligence or a causal connection between it and the personal injuries, he was not entitled to recover on either.—*Montana Auto etc. Co. v. Kearney*, 435.

Master and Servant—Safe Place to Work—Contributory Negligence—Proximate Cause—Evidence—Insufficiency.

16. In an action for damages for the fatal injury of a machinist helper in defendant railway company's shops, evidence *held* to show that the injury was proximately caused by his own reckless haste in releasing a chain which held in a perpendicular position a locomotive drive-wheel tire weighing between 1,200 and 1,400 pounds, which fell upon him, and was not due to the alleged negligence of defendant in failing to provide a safe place for him in which to work.—*Smith v. Chicago, Mil. & St. P. Ry. Co.*, 471.

Same—Proximate Cause—Pleading and Proof.

17. In an action to recover damages for personal injuries suffered by reason of a breach of duty owed to him by defendant, plaintiff

must allege facts and circumstances disclosing a breach of duty and establish by his evidence that such breach was the proximate cause of the injuries.—*Smith v. Chicago, Mil. & St. P. Ry. Co.*, 471.

Street Railways—*Respondeat Superior*—Effect of Verdict in Favor of Negligent Employee.

18. Where, in an action for personal injuries against a street-car company and one of its conductors through whose negligence the injuries were alleged to have occurred, the company being charged with liability under the principle of *respondeat superior*, the jury by its verdict exonerated the conductor—the negligent agent—from culpability, its verdict against the company cannot be sustained, since it could not be held negligent unless the agent was.—*Lowney v. Butte Electric Ry. Co.*, 497.

Same—Disposition of Appeals Under Above Circumstances.

19. Under circumstances such as referred to above, where the judgment in favor of the negligent agent has become final because of failure of plaintiff to appeal from it, a new trial being of no avail, the judgment will be reversed with directions to enter judgment for defendant principal. (See opinion on motion for rehearing.) *Lowney v. Butte Electric Ry. Co.*, 497.

Automobiles—Master and Servant—Negligence of Driver—Liability of Master—Instruction.

20. In an action for damages sustained in a collision with defendant company's taxicab, an instruction based on the admission that its driver's acts were within the scope of his employment, that the company was liable for his negligent acts, *held* not erroneous as assuming negligence on the part of the driver, especially where in other instructions the extent of defendant's responsibility was made clear.—*Rohan v. Sherman & Reed*, 519.

Same—Owner Liable for Damage Done by Employee—Statute.

21. Under section 5, subchapter 8, of Chapter 141, Laws of 1915, the owner of a vehicle employed for the conveyance of passengers is liable for all damage done by a driver in his employ to person or property while acting within the scope of his employment.—*Rohan v. Sherman & Reed*, 519.

PLEADING AND PRACTICE.

Pleading judgment in abbreviated form,—see Malicious Prosecution, 1.

Pleading—Complaint—Striking of Counts—When Proper.

1. Where a cause of action is stated in two or more counts and the evidence which establishes one will also support one or more of the others, the superfluous count or counts should be stricken out.—*Larson v. Marcy*, 1.

Libel *Per Se*—Newspaper Article—Construction of Language.

2. Words used in an alleged libelous newspaper article must be susceptible of but one meaning to constitute libel *per se*, and the libelous matter may not be segregated from other parts of it and construed alone.—*Schaffroth v. The Tribune*, 14.

Same—Complaint—Insufficiency.

3. Under the above rule, *held* that the complaint in an action for libel which alleged that in the heading of an article was published the fact that F. S. (the plaintiff) had admitted a theft, and that in the body of it appeared the statement that one G. S. had done so and was awaiting sentence for grand larceny, did not state a cause of action.—*Schaffroth v. The Tribune*, 14.

Cancellation of Instruments—Pleading Restoration of Property.

4. In an action for the cancellation of notes given for the purchase of farm machinery, absence of allegation and proof that plaintiff had restored everything of value received from defendant is fatal.—*Rowe v. Emerson-Brantingham Implement Co.*, 73.

Personal Injuries—Master and Servant—Employment of Minor—Complaint—Insufficiency.

5. The complaint in an action by a minor against a railway company to recover damages for personal injuries under section 1746, Revised Codes, making it negligence *per se* for an employee to hire a child under sixteen years of age, must allege that defendant employed plaintiff knowing him to have been under that age.—*Fallon v. Chicago, Mil. & St. P. Ry. Co.*, 130.

Same—Complaint—Insufficiency—Amendment—Denial, When not Error.

6. Refusal to permit plaintiff to amend his complaint at the close of his case was not error where the contemplated amendment, if permitted, would not have rendered the pleading sufficient.—*Fallon v. Chicago, Mil. & St. P. Ry. Co.*, 130.

Same—Negligence—Complaint—Knowledge of Defect—Insufficiency.

7. Complaint charging negligence on the part of defendant railway company in permitting an apron iron, with its convex side upward, to lie between the tracks near its roundhouse and shops where plaintiff, a call-boy, stepped upon it in the dark, causing him to fall and be injured, *held* insufficient for failure to allege when defendant actually learned, or had opportunity to learn, of its presence at the place of the accident.—*Fallon v. Chicago, Mil. & St. P. Ry. Co.*, 130.

Real Property—Vendor and Purchaser—Breach of Contract—Complaint—Description of Property.

8. In an action to recover the purchase price of land, the complaint must so describe the property that the particular tract may be identified.—*Smallhorn v. Freeman*, 137.

Pleading—Sufficiency—Inferences—When Rule may be Invoked.

9. Before the rule that whatever is implied in or reasonably to be inferred from allegations of a pleading is to be taken as directly averred may be invoked, it must appear that sufficient facts are stated to furnish a basis for the implication or inference.—*Smallhorn v. Freeman*, 137.

Same—Complaint—Definiteness—Special Demurrer.

10. A complaint to be proof against a special demurrer, ought at least to be sufficiently definite and certain to be on its face a bar to another suit on the same cause of action.—*Smallhorn v. Freeman*, 137.

Same—Sale—Breach of Contract—Complaint—Indefiniteness.

11. *Held*, under the above rules, that a complaint alleging that plaintiff was the owner of 320 acres of land in B. county, Montana, of the reasonable value of \$3,200, that he sold and conveyed the land to defendant, and that "the said sum has not been paid," was so uncertain as to the description of the property and the consideration for which the transfer was made, as to render it vulnerable to a special demurrer for uncertainty.—*Smallhorn v. Freeman*, 137.

Injunction—Riparian Rights—Complaint—Insufficiency.

12. *Held*, that the common-law doctrine of riparian rights does not prevail, and has not prevailed in Montana since the enactment of the Bannack Statutes in 1865, but the doctrine of appropriation does obtain and is controlling, and that therefore the complaint of an owner of agricultural land through which a stream was flowing in its natural channel the waters of which had been appropriated by defendant company and diverted so as to take all of them before they

reached plaintiff's land, for an injunction asked for on the ground that, though not owning a water right on the stream, as riparian owner he was entitled to have such amount of the waters flow in the channel as was necessary for household purposes and for watering livestock, did not state a cause of action.—*Mettler v. Ames Realty Co.*, 152.

Pleading—Object—Degree of Certainty.

13. The object of pleading is to notify the adverse party of the facts which the pleader expects to prove, and for that reason the allegation of such facts must be made with that certainty which will enable the opponent to prepare his evidence to meet the alleged facts. *Kozasa v. Northern Pacific Ry. Co.*, 233.

Involuntary Payment—Recovery Back—Extortion—Complaint—Conclusions—Insufficiency.

14. In an action to recover money claimed to have been involuntarily paid, the complaint, simply averring, by way of conclusion, that defendants by coercion, threats, and intimidation and by putting plaintiff in fear, extorted it from him, was insufficient to state a cause of action in the absence of an allegation of the facts constituting the legal basis for the charge of involuntary payment.—*Kozasa v. Northern Pacific Ry. Co.*, 233.

Practice—Challenging Jurisdiction—Special Appearance.

15. One desiring to challenge the jurisdiction of the court over his person on the ground that he had not been served with valid summons, must make a special appearance for that purpose.—*Hinderager v. MacGinniss*, 312.

Pleading—Corporate Capacity—Denial—Sufficiency.

16. While a general denial does not raise the question of plaintiff's corporate capacity, an allegation in the answer denying that defendant has, and averring that he "has not, sufficient information or knowledge to form a belief as to the truth" of plaintiff's averment that it is a duly organized and existing corporation, puts plaintiff upon proof of that fact.—*American Sav. Bank & Trust Co. v. Chapman*, 408.

Defective Summons—General Appearance—Waiver of Defect.

17. A motion to set aside a default judgment constitutes a general appearance and waives any defect in the service of summons.—*Hinderager v. MacGinniss*, 312; *Smith v. Franklin Fire Ins. Co.*, 441.

Fire Insurance—Notice of Loss—Complaint—Inferences—Sufficiency.

18. In an action on a fire insurance policy which among other things provided that loss should not become payable until sixty days after notice of loss had been received by defendant company, failure of the complaint to allege directly that sixty days had elapsed after service of notice and before commencement of action did not render the pleading insufficient where, by reference to the record, it appeared affirmatively that the complaint was filed sixty-five days after service of notice.—*Smith v. Franklin Fire Ins. Co.*, 441.

Same—Liability—Lapse of Sixty Days After Proof of Loss—Complaint.

19. The complaint in an action on a fire insurance policy must allege affirmatively that the sixty-day period provided for therein before the loss became payable had expired before commencement of the action. *Smith v. Franklin Fire Ins. Co.*, 441.

Same—Conditions Precedent—Performance—General Statutory Allegation of Performance Insufficient.

20. The lapse of sixty days mentioned above, not being a condition precedent which plaintiff could perform before commencing suit, her general allegation, permissible under section 6572, Revised Codes, that she had performed all conditions precedent to be performed by her, under the contract, did not supply the necessary allegation that the

period had elapsed before filing complaint.—*Smith v. Franklin Fire Ins. Co.*, 441.

Same—Ascertainment of Loss—Complaint—Burden of Insurer.

21. *Semble*: It would seem that where a fire insurance policy provides that loss shall not become payable until sixty days after ascertainment or estimate of its amount by the insured and the insurance company, or, if they differ, by a board of appraisers, the burden of the disclosing that that time had not elapsed before commencement of action is upon defendant company and not upon insured.—*Smith v. Franklin Fire Ins. Co.*, 441.

Same—Ascertainment of Loss—Complaint—Allegation of Demand and Refusal Sufficient.

22. *Held*, that an allegation that plaintiff had demanded adjustment of her claim under a fire insurance policy but that insurer had refused to participate in an ascertainment of the loss was sufficient to meet the requirement that action should not be commenced until sixty days after ascertainment of the loss by one of the methods prescribed in the policy.—*Smith v. Franklin Fire Ins. Co.*, 441.

Personal Injuries—Proximate Cause—Pleading and Proof.

23. In an action to recover damages for personal injuries suffered by reason of a breach of duty owed to him by defendant, plaintiff must allege facts and circumstances disclosing a breach of duty and establish by his evidence that such breach was the proximate cause of the injuries.—*Smith v. Chicago, Mil. & St. P. Ry. Co.*, 471.

Quieting Title—Cancellation of Instruments—Complaint—Insufficiency.

24. In an action to cancel instruments claimed to constitute clouds upon the title to mining property, thus preventing plaintiff from obtaining a bidder upon execution sale under a judgment in a mechanic's lien foreclosure proceeding, complaint *held* insufficient to state a cause of action under sections 6115 and 6116, Revised Codes (conceding, but not deciding, that the action could be maintained under those sections), for failure to allege the facts showing the apparent validity of the instruments claimed to constitute clouds as well as the facts showing their invalidity.—*Heavilin v. O'Connor*, 507.

Attachment—Discharge—Defective Complaint—Amendment Permissible.

25. Where discharge of an attachment is sought on the ground that the complaint does not state a cause of action, the inquiry as to the sufficiency of the pleading is confined to the questions whether the action is upon a contract, express or implied, for the direct payment of money; whether it states facts sufficient to constitute a cause of action against the defendant, and, if not, whether it can be amended so as to state a cause of action, a mere defective statement of a cause of action not being a sufficient ground for the discharge of an attachment.—*Savage Tire Sales Co. v. Stuart*, 524.

Insurance—Policy Requirements—Waiver must be Pleaded.

26. Where plaintiff in an action on an insurance policy relies upon a waiver of material provisions thereof, he must plead the facts constituting it, an allegation of full performance of all its conditions not being established by proof of waiver alone.—*Snell v. North British & Merc. Ins. Co.*, 547.

Deeds — Cancellation — Want of Capacity in Grantor — Complaint — Sufficiency.

27. In an action by an administratrix to set aside a deed on the ground that when her intestate executed it she was without understanding sufficient to make a valid contract, complaint examined and *held* sufficient to permit of proof from which the inference could properly be drawn that the grantor in putting her cross to and delivering the deed acted in obedience to the overpowering will of the grantee.—*Kiley v. Danahey*, 608.

Same—Cancellation—Rescission—Complaint.

28. Plaintiff having based her action on the ground that at the time the deceased grantor executed the deed sought to be set aside did not have capacity to make a contract under section 3595, Revised Codes, and not on the ground that she was entitled to rescind under section 3596, an allegation that she had restored or offered to restore everything of value deceased had received from defendant was not required. *Kiley v. Danahey*, 608.

PLEDGES.

Book accounts may constitute—Constructive delivery,—see Attachment, 4-6.

PRESUMPTIONS.**Contracts—Principal and Agent—Ratification.**

1. Ratification of a contract may be implied from any act or conduct on the part of the principal which reasonably tends to show an intention on his part to make the act of the agent his own, and where the agency is shown to exist, the facts will be construed liberally in favor of approval by the principal and very slight circumstances and small matters will suffice to raise the presumption of ratification.—*Larson v. Marcy*, 1.

Railroads—Fences at Station Grounds.

2. Where a railroad company chooses to fence its station grounds, though not required to do so, no presumption may be indulged against it because of the location and character of the fences if they meet all legal requirements as to their sufficiency.—*Larson v. Marcy*, 1.

Assault and Battery—Collapse of Plaintiff (a woman) on Witness-stand—Effect on Jury.

3. Unless the record affirmatively discloses that the collapse of a witness (plaintiff, a woman) on the witness-stand, in an action for damages for assault and battery, was prearranged and intended as a fictitious appeal to the jury to secure an unfair advantage, it will be presumed on appeal that the verdict was properly arrived at, uninfluenced by any extraneous matter.—*Hunt v. Van*, 395.

PRINCIPAL AND AGENT.

Ostensible authority of agent in charge of livestock shipment to change terms of contract—Burden of proof,—see Contracts, 15.

Promissory notes—Execution by agent—Ratification by principal,—see Promissory Notes, 4-7.

Proper refusal of instruction on agency,—see Intoxicating Liquors, 4.

PRINCIPAL AND SURETY.

See Sureties.

PROBATE PROCEEDINGS.

See, also, Executors and Administrators.

Claims by Guardian—Verification—Sufficiency.

1. Where a claim against an estate showed on its face that it was made by claimant as guardian, the fact that the verification required by section 7526, Revised Codes, was made by him individually without any reference to his official capacity as guardian did not render the claim fatally defective.—*In re Stinger's Estate*, 173.

Claims—Verification—Absence of Notary's Seal—When not Fatal Defect.

2. Section 320, subdivision 6, Revised Codes, prior to amendment thereof by Chapter 103, Laws of 1909, did not require a notary public to affix his seal to an affidavit; hence its absence from a verification to a claim against an estate made in 1907 did not render the verification insufficient.—In re Stinger's Estate, 173.

Probate Courts—Jurisdiction—Questions of Equitable Cognizance—When Properly Determinable.

3. Though the district court sitting in probate is without power, as a general rule, to determine questions of equitable cognizance, yet where a determination of such questions is a necessary incident to the carrying out of the powers expressly granted to it, it may take jurisdiction.—In re Stinger's Estate, 173.

Claims Against Estate—Subrogation—Jurisdiction.

4. A guardian petitioned the probate court to direct the administrator of an estate to pay to him personally claims due his wards which had been allowed by the administrator and approved by the judge, on the ground that he had become subrogated to the rights of the minors by payment to them of the notes upon which the claims were based. *Held*, under the above rule (par. 3) that the court having the power, directly granted, to direct payment and to determine to whom payment was due, it could properly pass upon the necessarily incidental question whether petitioner was entitled to payment under the principle of subrogation.—In re Stinger's Estate, 173.

Same—Guardians—Subrogation—Laches.

5. Where a guardian had made full and complete settlement with his wards, delays in arriving at a settlement were of no concern to an estate in a proceeding whereby he sought to obtain an order directing the administrator to pay to him allowed and approved claims, to the rights of his wards in which he alleged he had become subrogated.—In re Stinger's Estate, 173.

Same—Payment—Laches.

6. While an owner of a claim against an estate may take action to expedite payment where unreasonable delay has occurred, it is not obligatory upon him to do so; he may assume that claims will be paid in due course of administration when the estate is in condition to pay, without laying himself open to a charge of laches.—In re Stinger's Estate, 173.

Same—Guardians—Subrogation—When Proper.

7. Where a guardian had made full settlement with his wards of the affairs of his trust, including the proceeds of two promissory notes made payable to him in his official capacity, he was entitled to an assignment of the notes to him, in the absence of which subrogation could be decreed under the principle that equity will consider as done what in good conscience should have been done.—In re Stinger's Estate, 173.

Same—Guardians—Unwarranted Use of Trust Funds—Subrogation.

8. Under the rule that when one, acting in a fiduciary or representative capacity, uses his own funds to satisfy an obligation for the benefit of his trust, he is subrogated to the rights of his principal, *held* that a guardian who, having made an unwarranted investment of trust funds, was compelled to account therefor, was not deprived of his right to subrogation by the fact that the investment was unlawful.—In re Stinger's Estate, 173.

PROCESS.

See Jurisdiction—Summons—Waiver.

PROMISSORY NOTES.

Promise of Payment—Implied or Constructive Trusts.

1. *Quaere*: Did conveyance of all his property by a father to his children, with the understanding that the grantees should pay a note outstanding against him, create an implied or constructive trust capable of being enforced by the payee?—Larson v. Marcy, 1.

Novation—Implied or Constructive Trusts—Waiver.

2. From his acceptance of a new note from defendants for the one executed by their father (see paragraph 1 above) a novation resulted which barred plaintiff payee from thereafter enforcing the trust which he might otherwise have relied upon to secure payment of the original note.—Larson v. Marcy, 1.

Voluntary Associations—Liability of Members.

3. Persons conducting business as a voluntary association, using a common or trade name, may be held jointly and severally liable upon a note executed in the trade name by their agent authorized to do so. Larson v. Marcy, 1.

Unauthorized Execution by Agent—Ratification.

4. Though one member of a voluntary association had neither express nor implied authority, while acting as its manager, to execute a promissory note, and the instrument was therefore voidable at the election of his associates, they could ratify his act, whereupon the instrument became binding upon them as of the date of its execution, so far as the payee was concerned.—Larson v. Marcy, 1.

Principal and Agent—Ratification—Presumptions.

5. Ratification of a contract may be implied from any act or conduct on the part of the principal which reasonably tends to show an intention on his part to make the act of the agent his own, and where the agency is shown to exist, the facts will be construed liberally in favor of approval by the principal and very slight circumstances and small matters will suffice to raise the presumption of ratification.—Larson v. Marcy, 1.

Same—Ratification—Duty of Principal.

6. While mere acquiescence on the part of the principal in the act of the agent is not necessarily conclusive, it is to be considered an element of ratification upon the theory that it is the duty of the principal to repudiate the unauthorized act of his agent within a reasonable time after discovery, the repudiation being brought home to the party beneficially interested.—Larson v. Marcy, 1.

Same—Voluntary Association—Unauthorized Act of Agent—Ratification.

7. The father of defendants conveyed to them all his property, share and share alike, with the understanding that they should pay a note outstanding against him. The defendants conducted the business incident to the management of the property as a voluntary association under a trade name, one of them acting as manager; and as such he executed a new note for their father's outstanding one, signing it in the trade name. Thereafter the property was divided between them, the indebtedness evidenced by the note being recognized in the division and provision made for its payment. In an action on the note, *held*, under the above rules, that by their conduct the defendants ratified the otherwise unauthorized act of their codefendant and gave to the note the same binding force and effect as though express authority to execute it had been conferred upon the signing defendant.—Larson v. Marcy, 1.

Accommodation Maker Primarily Liable, When.

8. One who signed a note on its face in conjunction with others was primarily liable for its payment, even though he was an accommodation maker only.—*In re Stinger's Estate*, 173.

Co-makers—Statute of Limitations—Commences to Run, When.

9. An accommodation maker of a promissory note held liable for its payment was not prejudiced in her right to reimbursement from the principal debtor by the fact that the statute of limitations had run against her co-makers, since the limitation of an action as against him commenced to run only from the date the note was paid.—*In re Stinger's Estate*, 173.

PUBLIC POLICY.**Real Estate Broker—Sale to Self Voidable.**

1. A real estate broker intrusted with the privilege of selling the land of his principal, cannot sell to himself, and where he does so, the sale made by him is voidable at the option of the owner.—*Crowley v. Rorvig*, 245.

Same—Sale to Wife Voidable.

2. Where under a contract made by defendant land owner with plaintiffs (two individuals and a corporation) jointly, which authorized them to sell his property at a fixed price on a commission basis, a sale made to four persons, two of whom were the wives of the individual plaintiffs, was voidable at defendant's option, the fact that the two other purchasers bore no relation whatever to such plaintiffs not altering the rule condemning the sale.—*Crowley v. Rorvig*, 245.

Contracts—Indians—Grazing Contracts—Corrupt Use of Money—Invalidity.

3. A contract between an Indian and livestock men, under which the former agreed by the corrupt use of money to influence the members of his tribe toward preventing a certain person from receiving a lease of their lands for grazing purposes; to incite them to demanding the cancellation of other leases, without reference to the merits of the case and upon unverified statements of his employers; to prevent the cancellation of a lease to one of the latter in face of the fact that the government had just cause for canceling it, and to keep him on the reservation in defiance of an order canceling his lease and directing his removal, *etc.*, was void as against public policy, it being immaterial that the resulting action by the Indians may not have led to injury or may have been for the best interest of the Indians.—*White Bear v. Barth*, 322.

Same—Grazing Contracts—Personal Influence Over Indians—Invalidity.

4. A contract under which an Indian, who was a grandson of a former chief of his tribe and had been educated at Carlisle, who acted as interpreter for the Indians, was a regular attendant at their council meetings, prominent in tribal affairs and had great influence with them, being generally successful in having his views adopted even against pronounced opposition, was to exercise his personal influence with the Indians to obtain action favorable to his employers in the matter of leases of land for grazing, was void as against good morals and sound public policy.—*White Bear v. Barth*, 322.

QUIETING TITLE.

Complaint—Insufficiency,—see Cancellation of Instruments, 2.

RAILROADS.

See, also, Taxation, 1, 2.

Highway Crossings—Cattle-guards—Wing Fences.

1. Section 4308, Revised Codes, making it incumbent upon railroads to maintain good and legal fences on both sides of their track and

property, impliedly excepts highway crossings, at which, however, they must install cattle-guards made effective by wing fences on both sides of the highway.—*Bowers v. Chicago, Mil. & St. P. Ry. Co.*, 200.

Station Grounds—Fences not Required.

2. Railroad tracks at depot and station grounds where passengers and freight are received and discharged, where employees are required to pass continuously back and forth, and where public convenience requires free and unobstructed access, are impliedly excepted from the requirement of fencing made by section 4308, Revised Codes.—*Bowers v. Chicago, Mil. & St. P. Ry. Co.*, 200.

Fences at Station Grounds—Presumptions.

3. Where a railroad company chooses to fence its station grounds, though not required to do so, no presumption may be indulged against it because of the location and character of the fences if they meet all legal requirements as to their sufficiency.—*Bowers v. Chicago, Mil. & St. P. Ry. Co.*, 200.

Injury to Livestock at Fenced Station Grounds—Absence of Negligence—Nonliability.

4. In the absence of willfulness or negligence in handling their trains, railroad companies are not liable for injuring or killing livestock which stray into their depot or station grounds; hence where it was conceded by plaintiff that defendant company's locomotive engineer was not negligent in the handling of the train which killed a horse for which damages were sought, plaintiff was not entitled to recover.—*Bowers v. Chicago, Mil. & St. P. Ry. Co.*, 200.

Fences at Station Grounds Forming Trap—Evidence—Insufficiency.

5. Where there was a space on either side of the track, which had been fenced by defendant company though not required to do so, affording ample space for plaintiff's horse to keep out of the way of defendant's train, the contention that the fences created a trap from which the animal could not escape, held untenable in the absence of evidence showing that the fences constituted a trap or cul-de-sac.—*Bowers v. Chicago, Mil. & St. P. Ry. Co.*, 200.

Railroads While Under Control of Director-general of Railroads—Proper Party Defendant.

6. In an action against a railway company to recover damages for personal injuries suffered during the time defendant company's road was being operated by the director-general of railroads, the proper party defendant was the director-general and not the company.—*Bryson v. Great Northern Ry. Co.*, 351.

Same—Judgment Against Improper Party Defendant—Substitution of Proper Party by Supreme Court Unauthorized.

7. Where, in an action against a railway company for damages for the death of a locomotive engineer in a collision at a time when defendant's road was in the possession and control of the director-general of railroads under the Federal Control Act, the defendant company ineffectually endeavored to have the director-general substituted as the proper party defendant, the supreme court, on appeal by the company from a judgment in favor of plaintiff, is without jurisdiction, on motion of plaintiff, to substitute the director-general for the company and affirm the judgment, or order substitution and a new trial, but will reverse the judgment and order dismissal of the complaint.—*Bryson v. Great Northern Ry. Co.*, 351; *Ray v. Gallatin Valley Ry. Co.*, 367.

Livestock Shipments—Published Tariffs Part of Contract.

8. The published tariffs of a carrier, filed with and approved by the Interstate Commerce Commission, requiring a notation on the contract of shipment and the waybills of points at which livestock were to be fed and watered, form a part of the contract of shipment and are conclusive on the shipper (as well as the carrier), whether he has actual knowledge of them or not.—Cook v. Northern Pac. Ry. Co., 573.

Same—Prior Oral Negotiations Merged in Contract—Parol Evidence—Varying Terms of Writing.

9. Prior oral negotiations and directions as to points at which livestock should be stopped for resting and feeding were merged in the contract of shipment, where it and the waybills bore notations stating the points at which stops were to be made, and therefore parol testimony of directions to make other stops was incompetent as an attempt to vary the terms of the written contract.—Cook v. Northern Pac. Ry. Co., 573.

Same—Custom Varying Writing—Evidence—Inadmissibility.

10. Where the terms of a contract of shipment of livestock were clear and explicit as to where stops should be made for feeding and resting, parol testimony to the effect that it was customary for shippers to have them stop for those purposes at another point was inadmissible.—Cook v. Northern Pac. Ry. Co., 573.

Same—Livestock Shipment—Ostensible Authority of Attendant to Change Contract—Evidence—Insufficiency.

11. A livestock shipment contract on its face bore a notation that the lambs constituting the shipment should be stopped at a certain point for feed and rest. The attendant in charge had no authority, either actual or ostensible, to change the contract in any particular. The published tariffs forming a part of the contract provided that the points at which animals were to be stopped could not be changed otherwise than upon written instruction of the owner or his authorized agent, the question of ownership or agency to be determined by proper identification. The attendant, with the bill of lading in his possession, directed defendant carrier's agent in writing to change the notation as to the place where the stop should be made, stating that he was the person in charge. *Held*, that the burden of proving that the attendant had ostensible authority to make the change in the contract was upon defendant carrier, that the showing made to the agent by the attendant as to his authority to make the change was insufficient, and that therefore the court properly struck all evidence relating to the change.—Cook v. Northern Pac. Ry. Co., 573.

RATIFICATION.

See Promissory Notes, 4-7.

REAL PROPERTY.

See, also, Brokers, Deeds, Cancellation of Instruments.

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Vendor and Purchaser—Breach of Contract—Complaint—Description of Property.

1. In an action to recover the purchase price of land, the complaint must so describe the property that the particular tract may be identified.—*Smallhorn v. Freeman*, 137.

Title—How Transferred.

2. Generally speaking, the title to real estate may be transferred only by a definite written instrument supported by a lawful consideration.—*Smallhorn v. Freeman*, 137.

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Officers—Terms—Statutes—Construction.

1. If the language of a statute specifying the term of office of an official is ambiguous, the interpretation which limits the term to the shortest time should be adopted.—*Marcellus v. Wright*, 274.

Statutory Construction.

2. In construing a statute, the court must, if possible, ascertain the intent of the legislature in enacting it, and so construe it as to give effect to such intention.—*Bennett v. Meeker*, 307.

Curative Statutes—Limit of Legislative Power.

3. Under the constitutional provision that no one shall be deprived of property without due process of law, a curative Act cannot go to the extent of supplying jurisdiction where there was none in the first instance.—*Lamont v. Vinger*, 530.

Same—Void Order of Sale of Intestate's Property not Validated by Curative Act.

4. *Held*, under the above rule, that Chapter 4, Laws of 1915, providing that irregularities in obtaining an order of court for the sale of real property of an intestate shall not invalidate the sale was ineffectual to cure the fatal omission of the court to take the steps necessary to give it jurisdiction to make the order.—*Lamont v. Vinger*, 530.

STIPULATIONS.

Parties cannot by stipulation invest district court with jurisdiction,—see Jurisdiction, 2.

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Probate courts—Jurisdiction,—see Probate Proceedings, 3-8.

SUMMONS.

Constructive Service Insufficient, When.

1. A judgment in *personam* cannot be rendered upon constructive service of summons alone.—*Hinderager v. MacGinniss*, 312.

Same.

2. Where an attachment is issued in an action not falling within the provision of section 6656, Revised Codes, and service of summons is made by publication only, the property of defendant is not brought within the jurisdiction and control of the court, and a judgment by default, being one *in personam*, is void.—Hinderager v. MacGinniss, 312.

Motion to Set Aside Default—Defective Summons—General Appearance—Waiver of Defect.

3. A motion to set aside a default judgment constitutes a general appearance and waives any defect or irregularity in the service of summons.—Hinderager v. MacGinniss, 312; Smith v. Franklin Fire Ins. Co., 441.

SUPPLEMENTARY PROCEEDINGS.

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Abandonment of appeal without dismissal does not divest supreme court of jurisdiction,—see Appeal and Error, 8.

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SURETIES.

Judgment in claim and delivery against sureties on bond unwarranted, when,—see Claim and Delivery, 2.

Unauthorized Withdrawal of Bondsman—Effect.

1. Release or withdrawal of a surety on a bond given under the Grain Elevator Act, without the consent of the bailor of wheat, is no defense in an action for damages for the wrongful conversion of the grain stored.—State ex rel. Broadwater Farms Co. v. Broadwater Elevator Co., 215.

SURPLUSAGE.

In information,—see Criminal Law, 26.

TAXATION.

Railroad Snowsheds—Assessable by State Board of Equalization.

1. Snowsheds constructed by reinforced concrete and steel, with timber roofs, the walls of which on the mountainside of the track were imbedded in the ground four feet or more, the outer walls consisting of a series of piers grounded in holes from a foot to twelve feet deep, *held* part of defendant railway company's roadbed, and as such assessable, under section 16, Article XII, Constitution, by the state board of equalization and not by the county assessor.—Great Northern Ry. Co. v. Flathead County, 263.

Cooking Utensils on Construction Boarding-cars Assessable by State Board of Equalization.

2. Cooking utensils forming a necessary and usual equipment of cars used for boarding railway construction crews are part of its rolling

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stock and as such subject to assessment for taxation by the state board of equalization only.—*Great Northern Ry. Co. v. Flathead County*, 263.

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Technical preliminary objections—Waiver,—see *Appeal and Error*, 2.
 Technical violation of cross-examination rule harmless,—see *Evidence*, 1.

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How transferred,—see *Real Property*, 2.

Execution—Proceedings Supplementary—Question of Title to Property not Triable.

1. Contested claims as to title to property sought to be subjected to execution cannot be litigated in supplementary proceeding.—*Missoula T. & S. Bank v. Northwestern A. & T. Ins. Co.*, 370.

Property of Intestate—Title in Whom.

2. Under section 4819, Revised Codes, title to the property of one who dies intestate passes immediately to the heirs, subject to the control of the district court and to the possession of the administrator for the purposes of administration.—*Lamont v. Vinger*, 530.

TRIAL.

See various subjects pertaining to Trial.

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Of technical objections on rulings on preliminary motions, by failure to make them prior to trial,—see Appeal and Error, 2.

Hearsay Testimony—Error in Admitting not Waived by Eliciting Same Testimony on Cross-examination.

1. Where plaintiff had excepted to the admission of hearsay testimony, the error was not cured by the fact that on cross-examination of the witness he brought out the same testimony, nor did he thereby waive his right to urge the error on appeal.—*First National Bank v. Middleton*, 209.

Defective Summons.

2. Where defendant in an action in which an attachment had been issued moved to vacate a default judgment on the ground of want of jurisdiction because of invalid service of summons, and on the further ground of excusable neglect, at the same time asking for leave to file his answer, his appearance was general, resulting in a waiver of his objection to jurisdiction.—*Hinderager v. MacGinniss*, 312; *Smith v. Franklin Fire Ins. Co.*, 441.

Administrator's Sale—Notice.

3. In the absence of waiver, notice to the heirs of an intestate of a contemplated sale of real property is indispensable.—*Lamont v. Vinger*, 530.

Process—Jurisdiction—What Does not Constitute Waiver.

4. A party not served with process who does not voluntarily appear and contest the action upon the merits does not waive the question of jurisdiction by remaining passive.—*Lamont v. Vinger*, 530.

Insurance—Policy Requirements—Waiver must be Pled.

5. Where plaintiff in an action on an insurance policy relies upon a waiver of material provisions thereof, he must plead the facts constituting it, an allegation of full performance of all its conditions not being established by proof of waiver alone.—*Snell v. North British & Merc. Ins. Co.*, 547.

Rescission—When Right not Waived.

6. Where the purchaser of ranch property waited nearly a year for the vendor to make good his promise that he would buy the land upon which a barn and spring were located and which he had falsely represented as being included in the property sold, the former's acts in asking for an extension of time for payment of an installment of the purchase price due and cropping the land in the meantime did not constitute a waiver of his right to rescind.—*Fontaine v. Lyng*, 590.

Same—When Waived.

7. By continuing in possession of ranch property for more than five months after commencement of suit to rescind, the vendee waived his right of rescission under section 5065, Revised Codes, making it incumbent upon a party desiring to rescind to tender back possession and to keep the tender good by removal from the premises.—*Fontaine v. Lyng*, 590.

WAREHOUSEMEN.

See Grain Elevators.

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Breach,—see Contracts, 2, 3; Insurance, 12.

Improper issuance of writ of attachment,—see Attachment, 2.

WATERS AND WATER RIGHTS.

Retrial of water right suit on amended complaint—Evidence of deceased witness—Admissibility,—see Evidence, 2.

Common-law Doctrine of Riparian Rights—Extent of Rights.

1. Under the common-law doctrine of riparian rights, the right to the use and flow of waters of a stream in its accustomed channel is an inherent incident to the ownership of the riparian lands, a right annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land itself, and is not created by use or affected by disuse, and every riparian proprietor upon the same stream has the same right of reasonable use, the rights of each being qualified by the corresponding rights of the others.—Mettler v. Ames Realty Co., 152.

Riparian Rights—What Rights Paramount.

2. As between riparian right claimants, the use of water for household and domestic use, drinking and watering livestock, is paramount to artificial uses, irrigation, and other industrial purposes.—Mettler v. Ames Realty Co., 152.

“Riparian Proprietor”—Definition.

3. A riparian proprietor is one whose land borders upon a natural stream or through whose land such stream flows.—Mettler v. Ames Realty Co., 152.

Riparian Rights—Use of Water.

4. Under the doctrine of riparian rights, a riparian owner cannot divert to nonriparian lands the water which he has a right to use upon riparian lands.—Mettler v. Ames Realty Co., 152.

Doctrine of Appropriation—Rights of Appropriator.

5. Under the doctrine of appropriation the right to the use of the waters flowing in a natural stream is extended to riparian and non-riparian lands alike, it being immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which they are taken.—Mettler v. Ames Realty Co., 152.

Same.

6. An appropriator of water who has appropriated the entire flow of a stream may use all of it to the exclusion of riparian proprietors and junior appropriators, the only limitation imposed upon the extent of his appropriation being his needs and facilities for use.—Mettler v. Ames Realty Co., 152.

Same—Extent of Right.

7. If an appropriator's needs exceed the capacity of his distributing system, then the capacity of his means of diversion measures the extent of his right, and if the capacity of his distributing system exceeds his needs, then his needs limit the extent of his appropriation.—Mettler v. Ames Realty Co., 152.

Same—First in Time, First in Right.

8. Priority of appropriation of water confers superiority of right, without reference to the character of the use, whether natural or artificial.—Mettler v. Ames Realty Co., 152.

Same—Source of Right—Use of Water Subject to State Control.

9. An appropriator of water derives his right from the state and not from the national government, the use of waters flowing in natural streams in Montana being subject to state regulation and control.—*Mettler v. Ames Realty Co.*, 152.

Same—Appropriation may be Made from What Streams.

10. An appropriation of water is not confined to waters flowing in streams upon public land, but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary.—*Mettler v. Ames Realty Co.*, 152.

Same—Appropriation by Federal Government—Procedure.

11. Where the government of the United States desires to acquire the right to the use of waters flowing in natural streams in Montana, it must proceed as an individual to make an appropriation in compliance with the laws of the state.—*Mettler v. Ames Realty Co.*, 152.

Same—Injunction—Riparian Rights—Complaint—Insufficiency.

12. *Held*, that the common-law doctrine of riparian rights does not prevail, and has not prevailed in Montana since the enactment of the Bannack Statutes in 1865, but that the doctrine of appropriation does obtain and is controlling, and that therefore the complaint of an owner of agricultural land through which a stream was flowing in its natural channel the waters of which had been appropriated by defendant company and diverted so as to take all of them before they reached plaintiff's land, for an injunction asked for on the ground that, though not owning a water right on the stream, as riparian owner he was entitled to have such amount of the waters flow in the channel as was necessary for household purposes and for watering livestock, did not state a cause of action.—*Mettler v. Ames Realty Co.*, 152.

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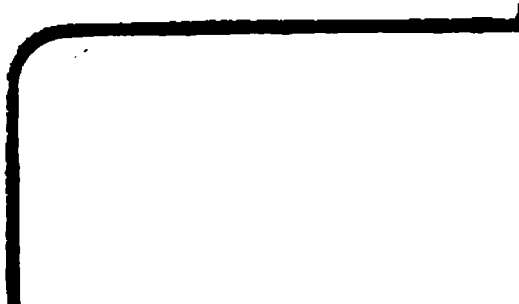
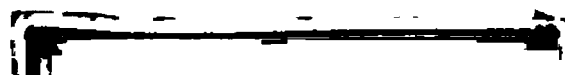
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